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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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No. .....

CHARLENE MITCHELL, *et al.*,

Appellants,

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JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of a three-judge court of the United States District Court for the District of Minnesota dismissing their complaint as moot and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The initial opinion dated Oct. 2, 1968, granting an order requiring the appellee, Joseph L. Donovan, to place the names of appellant presidential and vice-presidential candidates on the Minnesota general election ballot is

reported in 290 F. Supp. 642 (D. Minn. 1968) and is set out in the Appendix, *infra*, pp. 25-37. The later opinion July 14, 1969, granting an order allowing the amendment to the complaint, and dismissing the complaint, has not yet been officially reported. It is set out in the Appendix, *infra*, pp. 38-47.

Jurisdiction

Appellants brought this action in the United States District Court for the District of Minnesota for a temporary and a permanent injunction requiring the Secretary of State of Minnesota to accept the appellants' nominating petitions and to place the names of appellants Mitchell and Zagarell on the November, 1968 general election ballot in Minnesota and for a declaratory judgment that the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, is unconstitutional and void. 50 U. S. C. §§841 and 842 were cited by the appellees as barring the appellant candidates from the ballot.

The action was brought under 28 U. S. C. §1331, 28 U. S. C. §1343 (3) and (4), 42 U. S. C. §§1981, 1983, and 1988, and 28 U. S. C. §§2282 and 2284.

The three-judge court dismissed the appellants' complaint as moot on July 14, 1969, which order was entered on that same date. The notice of appeal was filed on August 13, 1969 in the United States District Court for the District of Minnesota in the Third Division.

The final order of the three-judge court dismissing the complaint is appealable to the Supreme Court of the United States under 28 U. S. C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime*

and Avocado Growers, Inc. v. *Jacobsen*, 362 U. S. 73 (1960), *Clark* v. *Poor*, 274 U. S. 554 (1927).

Statutes Involved

50 U. S. C. §841 provides:

§841. Findings and declarations of fact

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that

of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed. Aug. 24, 1954, c. 886, §2, 68 Stat. 775.

50 U. S. C. §842 provides:

§842. Proscription of Communist Party, its successors and subsidiary organizations

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of

the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or to any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, §3, 68 Stat. 776.

Questions Presented

1. Whether the three-judge court erred in dismissing the complaint on the ground of mootness, in view of the fact that there is uncontradicted evidence that the appellant Communist Party of Minnesota will participate in future Minnesota elections, and that the appellee Attorney General of the State of Minnesota has firmly established state policy that 50 U. S. C. §§841 and 842 (Communist Control Act of 1954) prohibits appellants from appearing on any Minnesota election ballots, by a formal public opinion of the Attorney General to this effect and by maintaining this position before the three-judge court after the three-judge court granted temporary relief.
2. Whether 50 U. S. C. §§841 and 842 is a bill of attainder in violation of Article I, Section 9, Clause 3 of the U. S. Constitution, and when applied by the states, is a violation of Article I, Section 10, Clause 1 of the U. S. Constitution.
3. Whether 50 U. S. C. §§841 and 842 is an ex post facto law in violation of Article I, Section 9, Clause 3 of

the U. S. Constitution, and when applied by the states is a violation of Article I, Section 10, Clause 1 of the U. S. Constitution.

4. Whether 50 U. S. C. §§841 and 842 violates freedom of speech, press, assembly and petition guaranteed by the First Amendment to the U. S. Constitution.

5. Whether 50 U. S. C. §§841 and 842 violates due process as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by not being reasonably restricted to the evil which it purports to control.

6. Whether 50 U. S. C. §§841 and 842 violates procedural due process as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by depriving an organization of liberty and property without affording those affected an adversary hearing, adequate notice of the charges, the right to counsel, the right to present evidence, the right to confront and cross-examine witnesses, the right to a judicial determination and written findings of fact, and the right to a written appeal.

7. Whether the action of the appellees in refusing to accept the nominating petitions from the appellants denied them due process of law and equal protection of the laws in that the deprivation of the right of the citizens of Minnesota to vote is a violation of due process and equal protection of the laws.

8. Whether the final order of the three-judge court dated July 14, 1969 denies appellants equal protection of the laws by requiring the appellants to follow additional procedures not required of other political candi-

dates by making it necessary that the candidates initiate a lawsuit each and every time they wish to appear on the Minnesota General Election ballot.

9. Whether 50 U. S. C. §§841 and 842 is in fact within the legislative power of Congress in that Article II, Section 1, Clause 2 of the U. S. Constitution limits the power of the federal government from interfering with the qualifications of federal presidential electors.

Statement of the Case

In accordance with M. S. A. 202.09, the Communist Party of Minnesota secured the signatures of over two thousand eligible voters of the State of Minnesota on a petition nominating the presidential and vice-presidential candidates of the Communist Party, U. S. A., appellants Charlene Mitchell and Michael Zagarell, which entitled the names of those candidates together with their party designation to be placed on the Minnesota General Election ballot for the 1968 election. The appellants, Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgensen, Trygve Larsen, Carl Lund, and Betty M. Smith, were also named on the nominating petition as candidates for the office of presidential elector (Affidavits of: Betty M. Smith, September 11, 1968; Michael Zagarell, September 10, 1968; James Erickson, September 10, 1968; Elmer Borman, September 10, 1968; Trygve Larsen, September 10, 1968; Earl Sorg, September 10, 1968).

Within the time limit set by Minnesota Statute 202.11(2), the nominating petition, with 2,394 signatures, was presented to appellee, Secretary of State of Minnesota, Joseph

L. Donovan, for filing. Upon the advice in an official written opinion of the appellee, Attorney General of Minnesota, Douglas M. Head, dated September 9, 1968, the Secretary of State refused to accept the nominating petition for filing (Affidavit of Lynn S. Castner, September 11, 1968; written refusal of appellee Secretary of State Donovan, September 9, 1968).

The written opinion of the State Attorney General stated that the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, bars the Secretary of State from accepting and filing the nominating petition submitted by the Communist Party of Minnesota and the Communist Party, U. S. A. (Affidavit of Lynn S. Castner, September 11, 1968).

The appellants then brought an action in the court below seeking a temporary and permanent injunction requiring appellee Secretary of State Donovan to accept and file the aforesaid nominating petition and to include the names of appellant candidates Charlene Mitchell and Michael Zagarell together with their party designation on the November 5, 1968 General Election ballot. A declaratory judgment was also sought to declare the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, unconstitutional and void in that it violates the following provisions of the United States Constitution: Article I, Section 9, Clause 3; Article 1, Section 10, Clause 1; Article II, Section 1, Clause 2; Article IV, Section 2, Clause 1; Article IV, Section 4; and the First, Fifth, Tenth, Twelfth, and Fourteenth Amendments (Complaint).

Chief District Judge Edward J. Devitt notified the United States Attorney General of the constitutional questions involved as required by 28 U. S. C. §2043 on Sep-

tember 24, 1968 (Notice to U. S. Attorney General, September 24, 1968).

United States Attorney for the District of Minnesota, Patrick J. Foley, appeared *amicus curiae* and urged that the Act is meant to disable the party as a party only and not its members, and he suggested that the right of Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depended in no degree on their status as nominees of the national or local Communist Party. He argued that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concluded that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It was therefore his view that the Communist Control Act of 1954 did not prohibit the Secretary of State from accepting the nominating petitions and including the nominees upon the ballot as candidates of the Communist Party (Opinion of the three-judge court, October 2, 1968, Appendix).

He also cited the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389 (1961), and urged that the court should hesitate long before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394. The brief of the United States admitted the seriousness of many of the appellants' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Con-

gress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions (Opinion of the three-judge court, October 2, 1968, Appendix).

The three-judge court granted a temporary injunction on October 2, 1968, reported as *Mitchell* v. *Donovan,* 290 F. Supp. 642 (D. Minn. 1968), which ordered the appellee Secretary of State Donovan to accept the appellants' nominating petition and to place the named candidates together with their party designation on the November 5, 1968 general election ballot. The appellee Donovan complied, and the appellant candidates' names did appear on the ballot in Minnesota as ordered.

The appellants appeared on the November 5, 1968 general election ballot with other minority party candidates and the following votes were received by minority party candidates in the election:

Wallace and Griffin, American Party, Nominated by Petition, 66,931 votes;

Holstead and Boutelle, Socialist Workers' Party, Nominated by Petition, 808 votes;

Blomen and Taylor, Industrial Government Party, Nominated by Petition, 285 votes;

Mitchell and Zagarell, Communist Party, U. S. A., Nominated by Petition, 415 votes;

Cleaver and Terry, Peace and Freedom Party, Nominated by Petition, 935 votes;

McCarthy, Nominated by Petition, 585 votes.

1,606,307 Total Ballots

170 Scattered Votes

(Affidavit of Assistant Secretary of State Forrest Talbott in support of motion to dismiss, November 8, 1968.)

After the November 5, 1968 general election, the appellants moved to amend the complaint, adding paragraphs stating that the Communist Party of Minnesota would participate in future Minnesota election. The appellees moved to dismiss the complaint on the ground of mootness (Appellant motion to amend complaint, October 9, 1968; affidavit of Betty M. Smith, November 2, 1968).

The three-judge court granted the motion to amend the complaint and the motion to dismiss on July 14, 1969 without considering the merits of appellants' claims, except in the granting of the temporary relief (Opinion of the three-judge court, July 14, 1969, Appendix).

The three-judge court did not adopt the position of the U. S. Attorney, nor did it pass on the merits of the appellants claims in its granting of temporary relief (Opinion of the three-judge court, October 2, 1968, Appendix).

The Questions Presented Are Substantial

1. ***A court cannot grant temporary relief and then claim that the granting of the temporary relief causes the original action to become moot and not an actual controversy when a federal statute remains in effect which can be used to inhibit appellants' electoral activities.***

Though the election in 1968 in which the appellant candidates were on the ballot is a past event, the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, retains the same force and effect as it had prior to that election. No formal judicial decision on the merits of the appellants' constitutional claims has been made which will govern future application of said statute to appellants' political plans. Appellees are thus free to repeat their past conduct and continue to hold that the Communist Control Act of 1954 prohibits allowing the candidates of the Communist Party from appearing on the ballot.

Not only are appellees free to continue their past interpretation but, in a hearing before Chief Judge Devitt on November 25, 1968, after the election, concerning appellants' motion to amend their complaint and appellees' motion to dismiss, the then Solicitor General of Minnesota, Richard Kyle, representing the appellee Attorney General of Minnesota, stated that the appellee Attorney General will continue to hold that 50 U. S. C. §§841 and 842 prohibits Communist Party candidates from appearing on Minnesota ballots:

> "The Court: On another subject, I notice that counsel's affidavit says on information and belief he has learned that you, or the attorney general, are go-

ing to persist in your viewpoint so that if some other Communist affiliated people file, you are going to take the same position.

Is there any basis for this information and belief?

Mr. Kyle: I think there probably is. At least there is no new case law which has come down which would, as far as I am concerned, dictate a different result, ultimately" (Transcript of hearing, November 25, 1968, pp. 7-8).

Moreover, in an official published opinion of the appellee Attorney General, the Attorney General ruled that 50 U. S. C. §§841 and 842 bar Communist Party candidates from the ballot and said, "However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

This Court stated in *Moore* v. *Ogilvie*, 89 S. Ct. 1493, 1494 (1969), that the fact of the past occurrence of an election did not require dismissal of a complaint based on official practices in that election where there was a strong indication of future repetition:

"Appellees urged in a motion to dismiss that since the November 5, 1968 election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which *MacDougall* v. *Green*, *supra*, allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore 'capable of repetition, yet evading review,' *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 515."

Though the appellant candidates did appear on the Minnesota General Election ballot on November 5, 1968, as they desired, *only the order of the court below made that event possible.* But for that order, the appellees, Minnesota Attorney General and Minnesota Secretary of State, would have adamantly continued to refuse to accept appellants' petition for nomination and to place appellant candidates' names on the ballot. Their acquiescence to appellants' requests was solely due to the court order below.

In *Gray* v. *Sanders*, 372 U. S. 368, 375 (1963), this Court stated, in reference to a procedurally similar circumstance:

> "Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and longstanding. For if the case was dismissed as moot appellants would be 'free to return to . . . [their] old ways.' *United States* v. *W. T. Grant Co.*, 345 U. S. 629".

See, e.g., Bohler v. *Lane*, 204 F. Supp. 168, 173 (D. Fla. 1962); *Morris* v. *Williams*, 149 F. 2d 703, 708 (8th Cir. 1945); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N. D. Cal. 1964); *Friends* v. *United States*, 388 F. 2d 579, 581 (D. C. Cir. 1967); and *Tyson* v. *Cages*, 363 F. 2d 742, 743 (5th Cir. 1966).

The position maintained by the appellee Attorney General is the result of an interpretation of an Act of Con-

gress which is still in effect and force. Thus, the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, provides an independent basis for the appellees' official position and, thereby, establishes a "firmly embedded" policy.

The uncontradicted affidavit of Mrs. Betty M. Smith, stating that the Communist Party will participate in future Minnesota elections, indicates that a controversy still exists which requires judicial resolution to prevent an identical repetition of events at the next election (Affidavit of Betty M. Smith, November 22, 1968).

This court has consistently granted review and decided election cases after the November 5, 1968 general election. *Brockington v. Rhodes*, cert. granted February 24, 1969, 37 L. W. 3301; *Allen v. State Board of Elections, Fairley v. Patterson, Bunton v. Patterson* and *Whitley v. Williams*, 393 U. S. 544 (1969); *Moore v. Ogilvie*, 394 U. S. 814 (1969) (May 6, 1969); *Hadnott v. Amos*, 394 U. S. 358 (1969); and *Hall v. Beals*, probable jurisdiction noted May 5, 1969.

The three-judge court readily allowed the appellants' motion to amend the complaint. The three-judge court distinguished election cases in the U. S. Supreme Court following the November 5, 1968 election as cases involving firmly embedded state policies as expressed in the statutes in the states involved (Opinion of the three-judge court, July 14, 1969, Appendix).

This case involves a firmly embedded state policy to bar Communist Party candidates from the ballot. The appellee Attorney General published an opinion, which will certainly be followed by all state election officials, advising that 50 U. S. C. §§841 and 842 bars Communist Party candidates from the ballot. While Attorney General opin-

ions are not binding, they will be followed by all state officials unless the state official wishes to challenge the ruling by court action. It is quixotic to think that any state official could possibly have an interest in defending Communist Party candidates' rights to appear on the ballot, and instituting lawsuits on their behalf. Therefore, unless the Communist Party candidates are allowed judicial resolution of the merits of their claims, the appellee Attorney General ruling will, practically speaking, have the force of a statute. Moreover, the appellee Attorney General, in his published opinion, called for judicial resolution of the questions.

The three-judge court in granting temporary relief did not adopt the U. S. Attorney's position that 50 U. S. C. §§841 and 842 does not bar Communist Party candidates from the ballot, and there is authority in a case in another state, the only opinion interpreting 50 U. S. C. §§841 and 842, in regard to Communist candidates, ruling that state Communist Party candidates are barred from the ballot. *Salwen* v. *Rees,* 108 At. 2d 265 (1954).

The three-judge court, in its opinions of October 2, 1968 and July 14, 1969, acknowledged that there are serious constitutional objections to 50 U. S. C. §§841 and 842; the U. S. Attorney in his *amicus curiae* brief to the three-judge court admitted that there are serious constitutional objections to 50 U. S. C. §§841 and 842; and Mr. Justice Harlan, in the only case in this Court dealing with 50 U. S. C. §§841 and 842, *Communist Party, U. S. A.* v. *Catherwood,* 367 U. S. 389 (1961), admitted that there were serious constitutional objections to 50 U. S. C. §§841 and 842. The merits of appellants' claims should be determined.

2. *The Communist Control Act, 50 U. S. C. §§841 and 842, is an unconstitutional bill of attainder.*

The Communist Control Act of 1954 sets out a Congressional finding that the organization entitled the Communist Party of the United States is guilty of membership and participation in a foreign-controlled seditious conspiracy. 50 U. S. C. §841. Upon such finding, it terminates all rights, privileges and immunities of that named organization. 50 U. S. C. §842.

A bill of attainder has been defined as a legislative pronouncement that a particular named person or a group of persons must be punished for committing certain acts. Punishment has been deemed to include deprivation of rights and privileges available to other citizens. *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 321, 323, 326, 18 L. Ed. 356 (1867); *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366 (1867); *United States* v. *Lovett*, 328 U. S. 303, 314-316 (1946); and *United States* v. *Brown*, 381 U. S. 437 (1965).

This Court has held that an act which specifically names the Communist Party and withholds some right or privilege from members of that named group available to others is a bill of attainder. *United States* v. *Brown, supra.* In commenting on *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961), the *Brown* Court stated: "A majority of the Court rejected the argument that the Act was a bill of attainder, reasoning that Section 3 does not specify the persons or groups upon which the deprivations set forth in the Act are to be imposed, but instead sets forth a general definition. . . ." 367 U. S. at 451.

The majority in *Communist Party, U. S. A.* v. *SACB, supra,* clearly agreed that if the Act had applied to the Communist Party by name, it would have been an illegal bill of attainder. It is clear that under the prior decisions of the Court the Communist Control Act should be declared an unconstitutional bill of attainder.

In the only case to consider the constitutionality of the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, this Court in *Communist Party, U. S. A.* v. *Catherwood, supra,* held that the Act did not intend to prohibit the Communist Party from being an employer, and thus the constitutional questions were not decided.

3. *The Communist Control Act, 50 U. S. C. §§841 and 842, is an unconstitutional ex post facto law.*

An ex post facto law has been defined as a law which imposes punishment for activity which was not punishable at the time it was committed. *Cummings* v. *Missouri, supra.* In *Cummings,* an oath which required persons engaged in many professions in Missouri after the Civil War to state, among other things, that the affiant had not engaged in any past conduct hostile to the United States, was held to be unconstitutional as an illegal ex post facto law.

The Court held that a deprivation of rights, in that case the right to pursue one's profession, was punishment and the statute was therefor an ex post facto law.

50 U. S. C. §§841 and 842 deprives the Communist Party of the United States of all rights, privileges and immunities, thus constituting a punishment under the above cases, solely on the basis of a legislative determination based upon supposed past conduct of that named organization. Therefore, the Act is an ex post facto law prohibited by the Constitution.

4. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates freedom of speech, press, assembly and petition.*

Minority political parties utilize the electoral forum to espouse their political ideology and to propose solutions for the problems that face society. By being able to participate in formal election procedures, they can attain a larger and more attentive audience than they could through use of other less effective vehicles for public debate.

This Court has often stated that the First Amendment was designed to provide the widest and most complete dissemination of pertinent information to the public so that the electorate can promote a viable governmental system through well informed choices of public officials and representatives. *Associated Press* v. *United States,* 326 U. S. 1 (1944); *Stromberg* v. *California,* 283 U. S. 35 (1931).

Fundamental to participation in electoral politics is the right to assemble together for a common purpose or discussion of public matters. "Effective advocacy . . . is undeniably enhanced by group association". *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, 460 (1958).

Official action designed to restrain operation of these and related rights has a "chilling effect" on speech, and on the entire electoral process itself.

5. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates due process.*

Governmental regulation must have a real and substantial relation and be restricted to the evil with which it claims to contend. *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934); *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957).

The Act purportedly is designed to protect the national security from activities which constitute a clear and present danger to the United States. However, the Act is not restricted to prohibition or control of dangerous activities but denies the Communist Party all its rights, including the right to engage in lawful, peaceful conduct such as participation in electoral politics.

A statute must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a potential interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966). Legislative abridgment of fundamental personal rights must be narrow and consistent with the least drastic means to achieve a valid purpose. *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *N. A. A. C. P.* v. *Alabama*, 377 U. S. 288 (1964); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

The Act is vague, overbroad, not reasonably related to the evil which it purports to control, and thereby violates due process of law.

6. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates procedural due process.*

This Court has consistently held that a governmental denial of liberty or property must be preceded by certain fundamental procedures of fairness. The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the charges against it which are relied upon to support the deprivation. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951). Minimally, a hearing must be provided to determine the validity of alleged facts.

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79 (1916); *Manley* v. *Georgia*, 279 U. S. 1 (1929); and *Tot* v. *U. S.*, 319 U. S. 463 (1943).

The Act does not provide any procedural safeguards to those to be punished, not even a hearing. Instead, 50 U. S. C. §841 finds that the Communist Party of the U. S. is a criminal conspiracy designed to overthrow the U. S. government, and 50 U. S. C. §842 deprives that organization of liberty and property solely on the basis of legislative fiat.

7. *The appellees' action in refusing appellants' nominating petition deprived appellants of due process and equal protection of the law.*

An unfair discrimination operating to deprive someone of the right to vote is a deprivation of due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments. *Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533 (1963); and *Carrington* v. *Rash*, 380 U. S. 89 (1965).

8. *The dismissal of the complaint by the court below deprives appellants of equal protection of the law by requiring appellants to follow additional procedures not required of other political candidates.*

This Court has held that a denial of equal protection of the law results from requiring certain political candidates or advocates of certain pieces of legislation to comply with procedures not required of other candidates or advocates, or to suffer certain burdens not required of those other candidates or advocates. *Hunter* v. *Erickson*, 393 U. S. 389 (1969); *Reitman* v. *Mulkey*, 387 U. S. 369 (1967); *Anderson* v. *Martin*, 375 U. S. 399 (1964).

Hunter v. *Erickson, supra,* struck down an amendment to the Akron, Ohio city charter which required any ordinance dealing with racial, religious or ancestral discrimination in housing to be approved by a referendum at a general or regular election before taking effect. This amendment required additional procedures to be followed in enacting this specific legislation, making it more difficult to enact this legislation as opposed to other legislation. See also, *Anderson* v. *Martin,* 375 U. S. 399 (1964).

If the decision of the three-judge court dismissing the complaint is allowed to stand, it will be necessary for Communist Party candidates to initiate a fresh lawsuit at the time of each and every election. With the inherent time limitations in litigation, a strong possibility exists that the merits of appellants' contentions will not be reached when further lawsuits are brought. Communist Party candidates will have to file a lawsuit, be granted a temporary injunction, and face dismissal of the suit after the election. Though the Communist Party candidates might still attain a position on the printed ballot, they will have to conform to this procedure of judicial interference which no other candidate need follow, which violates equal protection of the law.

9. *The Communist Control Act of 1954, 50 U. S. C. §§841 and 842, is not within the legislative power of Congress in that Article II, Section 1, Clause 2 of the United States Constitution limits federal control over the qualifications of presidential electors.*

Article II, Section 1, Clause 2 of the U. S. Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct; a Number of Electors,

equal to the whole number of Senators and Representatives to which the State may be entitled in Congress. . . ."

This provision narrowly limits the power of the federal government to interfere with the qualifications of presidential electors. This Court has stated that the States possess nearly exclusive control over the qualifications of presidential electors. *Fitzgerald* v. *Green*, 134 U. S. 377, 379, 380 (1890) and *McPherson* v. *Blacker*, 146 U. S. 1, 35 (1902).

Of course the federal government does retain power to control corrupt practices and to protect the right of all citizens to vote in presidential elections without discrimination. However, these areas of control relate to protection of the electoral process itself, and of the constitutional rights of the voters and office seekers. A prohibition of members of the Communist Party from the ballot denies constitutional liberties of the electorate and the appellants.

CONCLUSION

Jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion and Judgment of Three-Judge Court on October 2, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

vs.

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

PATRICK J. FOLEY, United States Attorney for the District of Minnesota, Minneapolis, Minnesota, as *Amicus Curiae.*

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

This expression is occasioned by the complaint of the Communist Party candidates for President and Vice-President of the United States and others allied with them in interest[1] against Joseph L. Donovan who, as the Secretary of State of Minnesota, is the public official charged with the administration of the election machinery of the State, and Douglas M. Head, Attorney General of Minnesota, growing out of the refusal of Secretary of State Donovan to accept for filing the nominating petition for the presidential and vice-presidential candidates of the Communist Party.

The plaintiffs request temporary and permanent relief ordering Secretary of State Donovan to accept the tendered nominating petition (which allegedly contains the names of 2,394 qualified electors of the State of Minnesota), and to place the names of the Communist Party candidates on the 1968 general election ballot. Further relief is requested in the form of a declaration of the inapplicability, or in the alternative the constitutional invalidity, of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. This law is the apparent authority for the Secretary of State's refusal to accept the plaintiffs' petition.

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[1] The other plaintiffs are: The Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

At a hearing held September 17, 1968, briefs were filed and arguments heard relating to the jurisdiction of the court over the subject matter of the controversy and the necessity and propriety of convening a statutory three-judge court. While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U. S. C. A. §§1331, 1343, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U. S. C. A. §§2282, 2284. *Flast* v. *Cohen*, 392 U. S. 83, 88 S. Ct. 1942 (1968).

Circuit Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit, Chief District Judge Edward J. Devitt, and District Judge Philip Neville, both of the District of Minnesota, the judges designated under authority of 28 U. S. C. A. §§2282 and 2284, heard oral arguments on the issues on September 30, 1968, following notice given on September 24, 1968 to counsel for all parties and to the United States Attorney for the District of Minnesota. In accordance with the provisions of 28 U. S. C. A. 2403, the Attorney General of the United States was notified by the court that the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, was drawn in question, and was advised that he would be permitted to intervene for the presentation of evidence, if evidence were otherwise admissible in the case, and for arguments on the question of the constitutionality of the law.

Extensive briefs have been filed on the questions of jurisdiction, the necessity that the matter be determined by a statutory three-judge court, the granting of preliminary

relief, and the applicability of, and the constitutionality of, the Communist Control Act of 1954.

It is not unlikely that a decision on the merits of this matter would involve a determination of the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. Since the passage of that Act there has been scant judicial or legislative consideration of its meaning and scope. In essence, the law contains a finding that the Communist Party and its adjuncts are a menace to the United States and should be outlawed (§841), and expresses a determination that the rights, privileges, and immunities normally attendant upon such bodies are terminated (§842).

The interdiction is broad and general in its terms, and jabs at the very core of our traditional constitutional freedoms. It is thus not a matter to be considered lightly. Its breadth and generality render its applicability to situations like the present a question not admitting of hurried solution. The results of a determination of the relevant issues on their merits may well have far-reaching national effect. The constitutionality of the Act is not settled, nor have the issues apparently involved in this case ever received authoritative judicial consideration. The Supreme Court of the United States has interpreted the Act on only one occasion. *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389, 81 S. Ct. 1465 (1961). In that case a decision on the constitutional question involved was avoided. But the court did imply a criticism of "the vague terminology" of §842 of the Act. The court observed that:

> "The statute contains no definition, and neither committee reports or authoritative spokesmen attempt to

> give any definition, of the clause 'rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof.'" 367 U. S. at 392, 393.

The question of validity of the Act, while not passed upon, was noted to contain "novel constitutional questions." 367 U. S. at 393. These observations might well be taken as a skeptical, if not jaundiced, view of the constitutional validity of the Act.

An examination of the expressions of the United States Supreme Court in other cases involving the control of allegedly subversive organizations, and cases in other areas involving similar constitutional doubts, may well be looked to as a harbinger of the probable view of the court if called upon in an appropriate case to pass upon the constitutionality of the Communist Control Act of 1954.

Because attempted legislative control of subversive groups and activities often involves curtailment of fundamental constitutional freedoms, the Supreme Court has required that the standards of clarity and specificity be applied with particular stringency to such statutes. At least two provisions of the Subversive Activities Control Act of 1950, sections which on their face are narrower and more specific than the statute here involved, have been stricken down as vague and overbroad. *United States* v. *Robel*, 389 U. S. 258, 88 S. Ct. 419 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 84 S. Ct. 1659 (1964). See also, Note, "Recent Developments in Communist Control Act Prosecutions," 16 W. Res. L. Rev. 206 (1964).

In the case before us, issues involving rights of suffrage, free speech, and free association are involved. Only the

most delicate control in such areas is to be tolerated. *Whitehill* v. *Elkins,* 389 U. S. 54, 88 S. Ct. 184 (1967); *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328 (1963); *Cramp* v. *Bd. of Publ. Instr. of Orange Cty., Fla.,* 368 U. S. 278, 82 S. Ct. 275 (1961). Legislative exclusions of the sort here being considered may be bills of attainder. *United States* v. *Brown,* 381 U. S. 437, 85 S. Ct. 1707 (1965).

The complaint, affidavits, briefs, and the oral arguments presented have raised substantial doubts regarding the Act's applicability and constitutional validity. These doubts are of sufficient proportion to warn that hurried arguments and precipitous decision of the issues would be unwise.

A "Memorandum for the United States as Amicus Curiae," has been filed over the signature of Patrick J. Foley, United States Attorney, advising that in his view the Communist Control Act is inapplicable to this case. He urges that the Act is meant to disable the Communist Party as a party only and not its members, and he suggests that the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depend in no degree on their status as nominees of the national or local Communist Party. He argues that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concludes that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It is therefore his view that the Communist Control Act of 1954 does not prohibit the Secretary of State from accepting the nominating peti-

tions and including the nominees upon the ballot as candidates of the Communist Party.[2]

The Government also cites the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood, supra*, and urges that we should "hesitate long" before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394.

The brief of the United States admits the seriousness of many of the plaintiffs' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Congress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions.

Because of the grave doubts which exist as to the constitutionality of the Communist Control Act, and in light of the amicus curiae position of the United States Attorney as to the inapplicability of the Act to the situation here, and his strong suggestions regarding its constitutional infirmities, it would be unwise for us, on such short notice, to attempt to resolve the issues on their merits. Additionally, it should be noted that the Attorney General of the United States, upon receipt and consideration of the statutory notice sent to him pursuant to 28 U. S. C. A. §2403, as to the pendency of the constitutional issues, may care to intervene, offer evidence, and make argument as he has a right to do. He should be afforded sufficient opportunity

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[2] At least one court, when presented with a similar problem, has observed that the Act reaches only to the prevention of the specific label, "Communist Party," from appearing on the ballot. *Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 (1954).

and time to present his views. See also, 28 U. S. C. A. §§516 and 517.

But, time is of the essence here. If a decision on the merits were not reached by October 7, 1968, probably the last date when the ballots must be delivered to the printer, the nominated candidates would not have a place on the printed ballot for the November 5, 1968 general election, and the plaintiffs, assuming some merit in their contentions, would be deprived of their individual constitutional rights. The plaintiffs have also sought to show that the lack of an expeditious resolution of the issues involved will substantially impede their proposed electioneering campaign in Minnesota.

On the other hand, the defendants have not urged, nor is there apparent, any grave or irreparable harm which would result from the grant of the requested temporary relief directing the placement of the Communist Party ticket on the ballot pending final disposition of the issues. It has been there several times before with unimpressive voter response.[3]

Thus, while the court finds and concludes that possible serious injury will accrue to the plaintiffs if the names of Charlene Mitchell and Michael Zagarell as Communist Party candidates for President and Vice-President do not appear on the printed ballet, it has found no discernible

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[3] According to the records in the office of the Minnesota Secretary of State, the Communist Party vote for President in Minnesota for the years 1924-1940 is as follows:

			Voting
1924	William Z. Foster—Workers Party	4,427	835,002
1928	William Z. Foster—Workers Communist	4,853	999,823
1932	William Z. Foster—Communist	6,101	1,003,009
1936	Earl Browder—Communist	2,574	1,120,179
1940	Earl Browder—Communist	2,711	1,257,491

probable injury which the defendants or the citizens of Minnesota will suffer if these names are placed on the ballot. A well-informed, intelligent electorate such as exists in the State of Minnesota undobutedly will be able fairly to discern and make appropriate decision upon the merits of the principles advocated by the Communist Party candidates and their sponsors.

IT IS THEREFORE ORDERED

That the defendant, Joseph L. Donovan, as Secretary of State of Minnesota, absent any prohibitive Minnesota law, accept for filing the nominating petition of the plaintiffs and, if upon examination thereof he determines that the petition complies in all respects with the requirements of the pertinent Minnesota statutes, he is directed to cause the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968 general election.

This expression is intended to comply with Rule 52 of the Federal Rules of Civil Procedure.

The Clerk is directed to return the nominating petition to plaintiffs' counsel.

Dated: October 2, 1968.

HARRY A. BLACKMUN
Harry A. Blackmun, *Circuit Judge*

EDWARD J. DEVITT
Edward J. Devitt, *Chief District Judge*

PHILIP NEVILLE
Philip Neville, *District Judge*

NEVILLE, *District Judge.*

I concur in the action taken by the court since it grants purely temporary relief. Personal disagreement on my part with the philosophy and teachings of Communism obviously does not furnish an answer to the question presented in this lawsuit. Assuming, as I do, the validity and truth of the findings made by Congress and recited in the Communist Control Act of 1954, the court, nevertheless is urged by plaintiffs to declare the Act unconstitutional. Congress declared the Communist Party to be "an instrumentality of a conspiracy to overthrow the Government of the United States," whose policies and programs "are secretly prescribed for it by the foreign leaders of the world Communist movement." Its existence was found to be "a clear present and continuing danger to the security of the United States" and the statute concludes "Therefore, the Communist Party should be outlawed."[1] The question of the validity of the Communist Control Act goes to the very bowels of our constitutional framework.

I would prefer to bottom jurisdiction on 42 U. S. C. §1983 (Civil Rights Act) and 28 U. S. C. §1343 rather than on 28 U. S. C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted "under color of [a] statute" of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition did not

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[1] 50 U. S. C. §841.

[2] Minn. Stat. §202.09.

apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much "action under color of law" as is the reverse. Also I agree that a three-judge court is proper.

I take issue with the court's opinion insofar as it expresses *grave* doubts as to the constitutionality of the Communist Control Act. I do not mean to say that it is free from all doubt. Further I believe that the United States Supreme Court, if and when it considers this case, may well conclude that if it permits the Communist Party to be on the ballot little, if anything, will be left of the Communist Control Act. Nevertheless I subscribe to the temporary relief granted by this court because of the shortness of time, the inability fully to study the problem and all its facets, and the belief that, balancing the equities, less harm results from granting the temporary relief than denying it.

Philosophically in a true democracy the majority should rule and whatever it votes or determines should prevail. Yet inherent in this concept are the seeds of self-destruction. Should the majority vote into power persons who avowedly urge and effect the overthrow of the present form of government, then no longer is there a democracy or the Republican Form of government guaranteed to the states by the United States Constitution.[3] Under the "clear and present danger" test prescribed by Holmes,[4] Congress found, or at least expressed the fear, that such might happen.

Philosophers and political scientists have pointed to the "paradox of freedom" and have held to the view that the

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[3] U. S. Const. art. IV §4.

[4] *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

principle of freedom cannot require that one can make the decision not to be free. It is not freedom to be allowed to destroy freedom.[5] It has been said that the best test of truth is the power of thought to get itself accepted in the marketplace. Many contend, however, that a democratic form of government should protect its freedom from those who disbelieve in its theory and would abandon and deny traditional civil liberties.

The court's opinion herein notes that the Supreme Court has held restrictions on the activities of individual Communists unconstitutional in situations where the statute attempted to prohibit an avowed Communist from working in a defense plant;[6] from holding an office in a labor union;[7] from obtaining a passport;[8] and in another case where benefits were sought to be denied the Communist Party as an employer under state unemployment laws.[9] These cases are, it seems to me, distinguishable, and relate to the movement and civil rights of particular individuals and are quite separate from and not precedent for the question of whether by the ballot we should give our democracy the right by democratic process to vote to destroy itself.

This most difficult question need not be and is not now decided. I feel, however, that while doubts as to constitutionality are not nearly as grave as the court's opinion

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[5] See Auerbach, The Communist Control Act of 1954, 23 U. CHI. L. REV. 173 (1956) containing a discussion at 188 et seq. on the freedom to abdicate liberty. A number of writers holding generally to this view are cited and quoted. See also Comment, The Communist Control Act of 1954, 64 YALE L. J. 712, 738 (1955).

[6] *U. S.* v. *Robel*, 389 U. S. 258 (1967).

[7] *U. S.* v. *Brown*, 381 U. S. 437 (1965).

[8] *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

[9] *Communist Party* v. *Catherwood*, 367 U. S. 389 (1961).

would indicate,[10] small harm can come from permitting the candidates to be on the ballot for this particular election; whereas if they are excluded and the court should be in error in such a decision some persons will have been deprived of their right to be candidates and others of their right to vote for such candidates. Therefore, I concur.

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[10] *Dennis* v. *United States*, 341 U. S. 494, 509 (1951), wherein the Court said:

> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the Government is required."

But *see Communist Party* v. *Control Board*, 367 U. S. 1 (1961), dissenting opinion of Justice Black at 137:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ."

Opinion and Judgment of Three-Judge Court on July 14, 1969

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA—THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

—vs.—

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, and DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declara-

tory relief based on issues arising from the conduct of the 1968 Presidential Election in Minnesota as it pertained to candidates running under the banner of the Communist Party. Defendants move for dismissal, asserting mootness.

This action, for injunctive and declaratory relief, was commenced in September, 1968 by Charlene Mitchell, the Presidential candidate of the Communist Party, and others,[1] against Secretary of State Donovan and Attorney General Head, of the State of Minnesota. The plaintiffs sought an order requiring Secretary Donovan to place the names and party designation of the Communist Party candidates for President and Vice-President of the United States on the ballot for the general election of November 5, 1968. Additionally, the plaintiffs sought a declaration that the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, the purported authority for the defendants' refusal to accept plaintiffs' nominating petition, is inapplicable to the present situation, or in the alternative, is constitutionally invalid.

In response to the original complaint, probable jurisdiction was noted, 28 U. S. C. A. §1343, and a statutory three-judge court was convened, 28 U. S. C. A. §§2282, 2284, to consider further the issues raised by the pleadings. After oral arguments, and study of briefs from the parties and the United States Attorney as *amicus curiae*, the court, in a memorandum opinion and order dated October 2, 1968, granted temporary relief in the form of an order directing defendant Donovan, as Secretary of State of

[1] The other plaintiffs are: the Vice-presidential candidate of the Communist Party, the Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

Minnesota, to accept for filing the nominating petition of plaintiffs, and upon a finding that the petition complied in all respects with the pertinent Minnesota statutes, to place the names of plaintiffs Mitchell and Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States on the ballot for the November 5, 1968 general election. That Memorandum and Order, containing a more detailed exposition of facts and reasoning, is reported as *Mitchell* v. *Donovan*, 290 F. Supp. 642 (D. Minn. 1968).

By affidavit with attached exhibits, it appears that defendant Donovan complied with the order of this court, and that the November 5, 1968 general election ballot contained the names "Mitchell and Zagarell" with the subdesignation "Communist Party USA/Nominated by Petition."[2]

On October 10, 1968, the plaintiffs moved to amend their complaint by adding allegations that the Communist Party plans to participate in Minnesota local, state, and national elections which occur after November 5, 1968, and that upon "information and belief," it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections.

One week after the November 5, 1968 general election the defendants moved to dismiss the complaint on the ground that "the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this court."

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[2] The plaintiff Mitchell and her running mate tallied 415 votes

[3] See e.g., *Moore* v. *Ogilvie*, — U. S. —, 89 S. Ct. 1493, 37

In our view the issues raised by the original pleadings are now moot since the plaintiffs' nominating petitions were accepted and their names and their party designation were placed on the ballot for the 1968 Presidential elections.

By their tendered amendment to the complaint, plaintiffs seek to have us rule for the future on the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842, on the theory that Communist Party candidates may seek some position on a Minnesota ballot in some future election and that the person who is Attorney General of Minnesota at that time may take a position that the provisions of the Communist Control Act of 1954 prevent such filing.

We readily allow the motion to amend the complaint, yet view the issues thus shaped as inappropriate for adjudication and dismiss the complaint because, in our view, such issues do not present a "controversy" as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U. S. C. A. §2201.[3]

It is fundamental that the Declaratory Judgment Act provided a judicial remedy, but did not repeal the cardinal standard of federal jurisdiction that a federal court may not decide what is not a "case or controversy." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937). In *Maryland Casualty*, the Court said:

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[3] "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 312 U. S. at 273.

That constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,

> "the Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Assoc., Inc. v. Rickover*, 369 U. S. 111, 112, 82 S. Ct. 580 (1962).

Put in another way, the Declaratory Judgment Act,

> "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Ser. Comm'n of Utah v. Wycoff Co.*, 344 U. S. 237, 241, 73 S. Ct. 236 (1952).

Here are guideposts which the United States Supreme Court has set as to when declaratory relief should be granted.

"(W)hen all of the axioms have been exhausted and all the words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the function and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting the relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature intervention, especially in the field of public law. A maximum of caution is necessary in the type of litigation we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Ser. Comm'n of Utah* v. *Wycoff Co., supra,* 344 U. S. at 243-4.[4]

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[4] Chief Justice Hughes expressed similar principles many years before in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937) as follows:

"The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' (citations omitted) . . .

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete,

Applying these principles to this case, it appears to us that no issue is here ripe for decision; that a disagreement, if it exists between the litigants, is nebulous and conjectural, not fixed and final in shape; and that no useful purpose would be served by a declaration of rights.

It is not at all certain that candidates will seek to run on the Communist Party Ticket at the next or at subsequent elections, albeit the affidavit of Mrs. Betty M. Smith, the State Secretary of the Minnesota Communist Party, alleges such future intention. From 1949 to 1968, no person sought to run on the Communist ticket in Minnesota for any public office. Of course, it is certain that future elections will be staged in Minnesota, but the bare certainty that future elections will be held is not enough. *Fair* v. *Dekle*, 367 F. 2d 377 (5th Cir. 1966), *cert. den.* 386 U. S. 996.

But even assuming that some candidate were to run for some office under the label of the Communist Party at some future election, it is not certain that at such future election the then Attorney General of Minnesota will be the same person who now holds that office or, if so, that he will take the same legal position that was taken by the Minnesota Attorney General in connection with the 1968 election. The present Minnesota Attorney General has not said he will view the Communist Control Act of 1954 as prohibiting persons from seeking ballot positions in future elections. In view of the now expressed opinion of the

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touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 300 U. S. at 239-241.

legal officers of the United States Government that the Communist Control Act of 1954 does not apply to the plaintiffs, it is doubtful if the Attorney General of Minnesota will presume to take a contrary position involving the interpretation of this federal statute at a future election.

The plaintiffs cite several decisions involving voting rights cases, particularly some just decided or now pending in the United States Supreme Court[5] as authority for the proposition that this court should entertain and adjudicate this case. In each of the cited cases, however, the plaintiffs were suffering under an adverse lower court ruling, the appeals were all perfected prior to the November 5, 1968 election, the issues were fixed and final in shape, and most important of all, these cases involve firmly-imbedded state policies concerning election rights as expressed in the statutes of the States involved.

There is no firmly-imbedded state policy in Minnesota as expressed by statute or otherwise at issue here, but only the possibility of a future adverse legal opinion by a then Attorney General of Minnesota on an uncertain issue as yet unformed. The statute involved is a federal, not a state, one. As noted, the view of the chief legal officer of the United States, speaking through his United States Attorney, is that the constitutionality of the Communist Control Act of 1954 is not involved and, in his view, the statute by its application does not prohibit the plaintiffs from the positions on the ballot which they sought.

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[5] See e.g., *Moore* v. *Ogilvie*, ——— U. S. ———, 89 S. Ct. 1493, 37 U. S. L. W. 4389 (May 5, 1969); *Hadnott* v. *Amos*, ——— U. S. ———, 89 S. Ct. 1101 (1969); *Allen* v. *State Board of Elections*, 393 U. S. 544, 89 S. Ct. 817 (1969); *Brockington* v. *Rhodes*, probable jurisdiction noted, 393 U. S. 1078, 89 S. Ct. 877 (1969).

So, in summary,

1. The issue as originally framed is moot because the election is over and plaintiffs were on the ballot as requested.

2. As to the future, there is no certainty or finality as to the issues sought to be adjudicated because there is no certainty as to whether any future candidates for office in a Minnesota election may seek to run under the banner of the Communist Party and if they do, that the issues formed by their attempted filing may be the same as they are in this lawsuit. Further, there is no certainty that the issues sought to be adjudicated in the present lawsuit will be similarly viewed by the Attorney General of Minnesota holding office at the time of a future election. The issues as raised by the pleadings do not represent any fixed or firm state policy governing elections which should be examined. In our view, therefore, the issues upon which decision is requested here, are nebulous and contingent—not fixed and final—as required by the Supreme Court.

3. At all events, no constitutional issue has been definitely joined in the present lawsuit because the United States Attorney General, charged with the duty of defending the constitutionality of the statutes of the United States, expressed the view that no constitutional issue was present and agreed with the plaintiffs that a proper interpretation of the law is that the plaintiffs were entitled to be placed on the ballot at the 1968 election as they requested. The United States Attorney General agrees with the plaintiffs' view of the law: the Minnesota Attorney General, by his motion for dismissal, does not care to contest the issue. In such a stance, who is there to oppose the plaintiffs?

4. No useful purpose would be served by a declaration of rights.

In the words of Justice Brennan, in a most recent decision of the United States Supreme Court, the constitutional question, if one exists,

> ". . . must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, —— U. S. ——, 89 S. Ct. 956, 960 (1969).

And, as the United States Supreme Court said in *United Public Workers of Amer. (CIO)* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556 (1947):

> "The power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." 330 U. S. at 89-90.

All the plaintiffs assert here is a "hypothetical threat" of a possible constitutional issue as yet unframed.

There is no "actual controversy" as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act.

The complaint is therefore DISMISSED.

Dated: 7/14/69

HARRY A. BLACKMUN, *Circuit Judge*

EDWARD J. DEVITT, *Chief District Judge*

PHILIP NEVILLE, *District Judge*

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FEB 26 1970
JOHN F. DAVIS, CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT FILED OCTOBER 11, 1969
PROBABLE JURISDICTION NOTED JANUARY 12, 1970

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List of Docket Entries

1. July 14, 1969, Amended Complaint filed.

2a. September 17, 1968, Affidavit of Lynn S. Castner filed.

2b. September 17, 1968, Affidavit of Betty M. Smith filed.

2c. September 17, 1968, Affidavit of Michael Zagarell filed.

2d. September 17, 1968, Affidavit of James Erickson filed.

2e. September 17, 1968, Affidavit of Elmer Borman filed.

2f. September 17, 1968, Affidavit of Trygve Larsen filed.

2g. September 17, 1968, Affidavit of Earl Sorg filed.

2h. September 17, 1968, Affidavit of Mrs. Lynn Stein filed.

2i. September 17, 1968, Affidavit of Fred Matsch filed.

2j. September 17, 1968, Affidavit of Mrs. Betty M. Smith In Support of a Temporary Restraining Order filed.

3. September 26, 1968, Joint and Separate Answer of Defendants Joseph L. Donovan and Douglas M. Head and Affidavit of Forrest Talbott (Exhibit to Answer) filed.

4a. September 17, 1968, Opinion of the defendant Attorney General of the State of Minnesota Douglas M. Head to the defendant Secretary of State Joseph L. Donovan stating that 50 U.S.C.A. §841 and §842 (the Communist Control Act of 1954) bars the plaintiffs from appearing on the ballot filed.

4b. September 17, 1968, Written refusal of the defendant Secretary of State Joseph L. Donovan to accept the plaintiffs' nominating petition filed.

5. September 17, 1968, Motion to convene a three-judge court and for a temporary injunction filed.

6. September 19, 1968, Order of Chief Judge Edward J. Devitt convening a three-judge court filed.

7. September 24, 1968 Notice by Chief Judge Edward J. Devitt to the United States Attorney General as required by 28 U.S.C.A. §2403 filed.

8. October 9, 1968, Notice of Trial filed.

9. October 9, 1968, Plaintiffs' notice of motion and motion to amend complaint filed.

10. November 22, 1968, Affidavit of Plaintiff Betty M. Smith in support of plaintiffs' motion to amend complaint filed.

11. November 8, 1968, Defendants' motion to dismiss the action as moot filed.

12. November 8, 1968, Affidavit of Assistant Secretary of State for the State of Minnesota Forrest Talbott in support of defendants' motion to dismiss filed.

13. November 25, 1968, Pages 7 and 8, Transcript of the hearing before Chief Judge Edward J. Devitt on plaintiffs' motion to amend the complaint and the defendants' motion to dismiss as moot heard.
November 25, 1968, Page 12, line 24 through page 15, line 4, Transcript of the hearing before Chief Judge Edward J. Devitt on plaintiffs' motion to amend the complaint and the defendants' motion to dismiss as moot heard.

14. August 12, 1969, Notice of Appeal to the Supreme Court of the United States served.

15. September 22, 1969, Amendments to the Notice of Appeal to the Supreme Court of the United States served.

October 2, 1968, Opinion and Judgment of Three-Judge Court.

July 14, 1969, Opinion and Judgment of Three-Judge Court.

Amended Complaint

[Filed July 14, 1969]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

Parties

I.

Plaintiff Mrs. Charlene Mitchell, a citizen of the United States and the State of New York, is a duly nominated candidate of the Communist Party of the United States for President of the United States; plaintiff Mr. Michael Zagarell, a citizen of the United States and the State of New York, is a duly nominated candidate of the Communist Party for Vice-President of the United States.

II.

The plaintiff Communist Party of the United States, an unincorporated association, is a national political party which has its principal place of business in New York, New York.

III.

Plaintiff Communist Party of the State of Minnesota, an unincorporated association, which has its principal place of business in Minneapolis, Minnesota, is the Minnesota-

Dakotas Division of the Communist Party of the United States, and Mrs. Betty M. Smith is the Secretary of the Communist Party of the State of Minnesota.

IV.

Plaintiffs Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith, citizens of the United States and the State of Minnesota, eligible voters of the State of Minnesota, are qualified as presidential electors according to Minnesota law, and are duly qualified and approved candidates for the office of presidential elector by the Communist Party of the United States and the Communist Party of Minnesota.

V.

Plaintiff Earl Sorg, a citizen of the United States and a citizen of the State of Minnesota, an eligible voter in the State of Minnesota, and plaintiff Lynn Stein, a citizen of the United States and a citizen of the State of Minnesota, an eligible voter in the State of Minnesota, are signers of a petition to nominate Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith as candidates for the office of presidential elector.

VI.

Plaintiff Earl Sorg and plaintiff Lynn Stein are members of a class composed of two thousand, three hundred, and ninety-four (2394) eligible voters of the State of Minnesota who have signed the aforesaid petition.

VII.

Plaintiffs Earl Sorg and Lynn Stein bring this action pursuant to Rule 23 Federal Rules of Civil Procedures on behalf of themselves and all persons constituting the above described class who are so similarly situated. The members in the class are so numerous that joinder of all members is impracticable; there are questions of law, of fact common to the class; the claims of the represented parties are typical of the claims of the class; and the represented parties will fairly and adequately protect the interests of the class.

VIII.

Plaintiff Fred Matsch, a citizen of the United States and a citizen of the State of Minnesota, is an eligible voter in the State of Minnesota who did not sign the aforesaid nominating petition.

IX.

Plaintiff Fred Matsch is a member of a class composed of all eligible voters of the State of Minnesota who have not signed the aforesaid nominating petition.

X.

Plaintiff Fred Matsch brings this action pursuant to Rule 23 Federal Rules of Civil Procedure on behalf of himself and all persons constituting the above described class who are so similarly situated. The members in the class are so numerous that joinder of all members is impracticable; there are questions of law, of fact common to the class; the claims of the represented party are typical of the claims of the class; and the represented party will fairly and adequately protect the interests of the class.

XI.

Defendant Joseph L. Donovan is the Secretary of State of the State of Minnesota.

XII.

Defendant Douglas M. Head is the Attorney General for the State of Minnesota.

Jurisdiction

XIII.

Jurisdiction of the parties of this suit is conferred on this Court by 28 United States Code 1331; 28 United States Code 1343 providing for original jurisdiction of this Court in suits authorized by 42 United States Code 1983; 28 United States Code 2201 and 2202 relating to declaratory judgments; 28 United States Code 2282 and 2284 providing for a three-judge District Court wherever application is made for an injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States; 42 United States Code Section 1981, 1983, and 1988; and by the following provisions of the Constitution of the United States:

(a) Article 1 Section 9(3) which provides:

> No Bill of Attainder or ex post facto Law shall be passed.

(b) Article 1 Section 10(1) which provides:

> No State . . . pass any Bill of Attainder, ex post facto law, . . .

(c) Article 2 Section 1(2) which provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

(d) Article 4 Section 2(1) which provides:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

(e) Article 4 Section 4 which provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, . . .

(f) First Amendment to the U.S. Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(g) Fifth Amendment to the U.S. Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law: . . .

(h) Tenth Amendment to the U.S. Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people.

(i) Twelfth Amendment to the United States Constitution which provides for the manner of election of the President and Vice-President of the United States.

(j) Fourteenth Amendment to the U.S. Constitution:

. . . No State shall make or enforce any law which shall abridge the privileges or . . .

XVI.

The petition for nomination complied in every respect with the requirements of Section 202.10, Section 202.11, and Section 202.12 Minnesota Statutes (all of which are attached hereto in appendix C).

XVII.

On September 9, 1968, the said nominating petition was duly and properly delivered and tendered to defendant Joseph L. Donovan, Secretary of State, as required by Section 202.13 Minnesota Statutes (attached hereto in appendix C).

XVIII.

Notwithstanding the fact that the aforesaid nominating petition met all the requirements of law, defendant Joseph L. Donovan, on September 9, 1968, wrongfully refused to accept for filing, acknowledge, file and preserve the aforesaid nominating petition subject to public inspection as required by Section 202.13 Minnesota Statutes. Defendant

Joseph L. Donovan's wrongful refusal was based upon an opinion issued to him on September 9, 1968 by defendant Douglas M. Head, Attorney General of Minnesota (a full copy of which is attached hereto as appendix E) which states that defendant Donovan "should refuse to accept for filing the nominating petition in question" because of the provisions of the Communist Control Act of 1954, 50 U.S. Code Section 841 and Section 842 (1954) which provides in part as follows:

> Your attention is directed to the Communist Control Act, 50 U.S.C. § 841 (1954) which provides, in part, as follows:
>
> > The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States . . . . Therefore, the Communist Party should be outlawed.
>
> Section 842 of the Communist Control Act declares that:
>
> > The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever

> rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated . . . .

Defendant Joseph L. Donovan's written refusal to accept the petition is attached hereto as appendix D.

XIX.

Because of the acts of the defendants as alleged herein, plaintiffs Charlene Mitchell and Michael Zagarell, candidates of the Communist Party of the United States for President and Vice-President of the United States will not appear upon the ballot in the State of Minnesota in the forthcoming General Election to be held on November 5, 1968 unless relief is granted as hereinafter prayed for.

XX.

Because of the illegal actions of the defendants as alleged herein, plaintiff Communist Party of the United States, plaintiff Charlene Mitchell, and plaintiff Michael Zagarell will be illegally excluded from a place on a ballot in the November 5 Minnesota General Election in violation of the prohibition against bills of attainders, in violation of Article 2 Section 1 (2) and the First, Fifth, Tenth, Twelfth Amendments, and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

XXI.

Because of the illegal acts of the defendant as alleged herein, plaintiffs Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith will be precluded from running for the office of presidential elector.

XXII.

Because of the illegal actions of the defendants as alleged herein, plaintiffs Earl Sorg, Lynn Stein, Fred Matsch, and the classes they represent, will be disenfranchised and deprived of their fundamental constitutional rights in the following respects:

(a) By denying them the right to vote for candidates of their choice for President and Vice-President of the United States in violation of Article 2 Section 1 Clause 2 of the United States Constitution.

(b) By denying them the privilege and immunity guaranteed citizens in the several states, contrary to Article 4 Section 2 of the United States Constitution.

(c) By violating the guarantee of the republican form of government, contrary to Article 4 Section 4 of the United States Constitution.

(d) By denying them a voice and vote by excluding them from the electoral process, contrary to the First Amendment to the United States Constitution.

(e) By denying them the equal protection of the laws and due process of law contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

XXIII.

The illegal actions of the defendants as alleged herein are based upon the misconstruction and misapplication of the Communist Control Act of 1954 which, as properly construed and applied, does not deprive plaintiff Communist Party of the United States and its candidates of the right to appear on the ballot in the State of Minnesota, nor does it deprive plaintiffs Earl Sorg, Lynn Stein, and Fred Matsch the right to vote for candidates of their choice.

XXIV.

The Communist Control Act of 1954 on its face and as construed and applied by the defendants, violates the following provisions of the United States Constitution:

(a) Article 1 Section 9 Clause 3

(b) Article 2 Section 1 Clause 2

(c) Article 4 Section 2 Clause 1 and Section 4 and the

(d) First, Fifth, Tenth, and Twelfth Amendments

XXV.

The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local, state, and national elections subsequent to the November 5 Minnesota General Election.

XXVI.

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their endorsement from participating in any local, state, or national election in the State of Minnesota.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and those similarly situated:

1. That the Court convene a statutory three-judge Court pursuant to 28 United States Code-Section 2282 and Section 2284;

2. That the Court issue a temporary restraining order and permanent injunction requiring defendant Secretary of State Joseph L. Donovan to accept and file the aforesaid petition for nomination as required by Section 202.13 Minnesota Statutes, and require that defendant Donovan include upon the ballot for the General Election to be held on November 5, 1968, the names of Charlene Mitchell and Michael Zagarell as candidates of the Communist Party of the United States for President and Vice-President of the United States, as required by Section 208.04 Minnesota Statutes;

3. That the Court declare that the Communist Control Act of 1954, on its face or as applied in this case, violates Article 1 Section 9 Clause 3, Article 2 Section 1 Clause 2,

Article 4 Section 2 Clause 1 and Section 4, and the First, Fifth, Tenth, and Twelfth Amendments to the United States Constitution;

4. That the Court declare that the acts of the defendants herein complained of are wrongful and in violation of the following provisions of the United States Constitution: Article 1 Section 9 Clause 3 and Section 10 Clause 1; Article 2 Section 1 Clause 2; Article 4 Section 2 Clause 1 and Section 4; and the First, Fifth, Tenth, Twelfth, and Fourteenth Amendments; and

5. For such other and all relief that the Court may determine equitable and proper.

Dated September 11, 1968; paragraphs XXV and XXVI, amendments, allowed by the Court, July 14, 1969.

MINNESOTA CIVIL LIBERTIES UNION

By LYNN S. CASTNER
Attorney for Plaintiffs
925 Upper Midwest Building
Minneapolis, Minnesota 55401
333-2534

Of Counsel:

MELVIN L. WULF
Legal Direction
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Affidavit of Lynn S. Castner

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. LYNN S. CASTNER, being first duly sworn, deposes and says:

That he is attorney for the plaintiffs herein.

That at or about 1:30 p.m. on September 9, 1968 your affiant, accompanied by plaintiff Betty M. Smith and Miss Mary Lou Patterson, New York City representative of the Mitchell-Zagarell campaign committee and Mr. Michael Eisenscher, Milwaukee staff representative of the Mitchell-Zagarell campaign committee, went to the office of Joseph L. Donovan, Secretary of State of the State of Minnesota to present a nominating petition containing two thousand, three hundred, and ninety-four (2394) signatures to place on the Minnesota General Election ballot on November 5, 1968 Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund and Betty M. Smith as presidential electors.

That your affiant introduced plaintiff Betty M. Smith and her associates to Secretary of State Donovan, and explained that your affiant was present to witness the filing of the said nominating petition.

Plaintiff Smith handed the said nominating petition to the Secretary of State Joseph Donovan who told your affiant he refused to accept said nominating petition and handed your affiant a written notice which reads:

September 9, 1968

TO ANY AND ALL PERSONS PRESENTING A NOMINATING PETITION OF THE COMMUNIST PARTY FOR FILING WITH THE SECRETARY OF STATE OF MINNESOTA FOR THE PURPOSE OF NOMINATING PRESIDENTIAL ELECTORS FOR THE GENERAL ELECTION OF 1968:

Please be advised that upon the advice of the Attorney General of Minnesota and at his direction as a matter of law, I hereby officially refuse and reject said petition.

JOSEPH L. DONOVAN
Secretary of State

Secretary of State also handed your affiant a copy of an opinion of Attorney General of the State of Minnesota Douglas M. Head which reads:

September 9, 1968

You have requested our opinion as to whether you should accept for filing a nominating petition for presidential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of the United States.

Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1964) which provides, in part, as follows:

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed."

Section 842 of the Communist Control Act declares that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose subject or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . . "

In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings.

Your affiant requested Secretary of State Donovan to physically examine said nominating petition. Secretary of State Donovan did open a manila envelope which your affiant handed to him, and thumbed through a number of pages and stated that it appeared to be a petition of the Communist Party of the United States to place their ticket on the Minnesota General Election ballot of November 5, 1968.

Secretary of State Donovan informed your affiant that he could not accept said nominating petition and handed it to your affiant. Your affiant took said nominating petition and presented it to Assistant Secretary of State Forrest Talbott who sealed said petition with gummed tape in a manila envelope, and upon the envelope wrote the words, "Sealed after identification Sept. 9, 1968 as Communist Party petition to nominate presidential electors presented to Secretary of State of Minnesota and by him refused Sept. 9, 1968. Forrest Talbott, Asst. Sec. of State"

Dated September 11, 1968.

LYNN S. CASTNER

[Subscription omitted in printing.]

Affidavit of Betty M. Smith

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota and she is an eligible voter in the State of Minnesota.

That your affiant holds the office of Secretary of the Communist Party of Minnesota, an unincorporated association whose principal place of business is in Minneapolis, Minnesota, and which is the Minnesota-Dakotas District of the Communist Party of the United States, an unincorporated association whose principal place of business is in New York, New York.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters in Minnesota as a nominated candidate for the

office of presidential elector, and she was duly qualified as a presidential elector candidate, together with the other nine (9) plaintiff presidential elector candidates, by the Communist Party of Minnesota.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly convened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That your affiant was a participant in this convention which duly elected six (6) delegates and an alternate delegate to the national convention of the Communist Party of the United States held in New York on or about July 4-7, 1968.

That at the convention of the Communist Party of Minnesota a motion was passed that if the national Communist Party convention nominated a presidential ticket, that the Communist Party of Minnesota would endeavor to place the candidates on the ballot of the General Election in Minnesota, November 5, 1968.

That your affiant was an elected delegate, and did attend the national convention of the Communist Party of the United States.

That at the national convention, on or about July 7, 1968, Mrs. Charlene Mitchell was duly nominated as a Communist Party of the United States candidate for the office of president of the United States, and that Mr. Michael Zagarell was duly nominated as a Communist Party of the United States candidate for the office of vice-president of the United States.

That without delay the Communist Party of Minnesota obtained the required ten (10) candidates for the office of presidential elector, and duly qualified those ten (10) presidential elector candidates.

That on or about Sunday, September 8, 1968, your affiant had assembled the nominating petitions containing two thousand, three hundred and ninety-four (2394) signatures.

That on Monday, September 9, 1968, your affiant, accompanied by Miss Mary Lou Patterson, New York City representative of the Mitchell-Zagarell Campaign Committee and Mr. Michael Eisenscher, Milwaukee staff representative of the Mitchell-Zagarell Campaign Committee, went to the office of Joseph L. Donovan, Secretary of State of the State of Minnesota to present the nominating petition.

That your affiant and her associates appeared at the office of the Secretary of State during the noon hour, and was informed by an office employee that if the petitions were presented that they would be refused.

That your affiant called Lynn S. Castner, Executive Director, Counsel of the Minnesota Civil Liberties Union and requested legal assistance in placing the names of the plaintiff petition candidates on the ballot.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union in this matter.

That at or about 1:30 p.m. on September 9, 1968 your affiant and her attorney, Lynn S. Castner, presented the nominating petitions to Secretary of State who refused to accept the nominating petitions, but that he did open the package and examine the contents of the petitions before refusing the same.

That the Secretary of State handed to your affiant and her attorney his written refusal to accept the petitions together with a copy of an opinion by Douglas M. Head, Attorney General of the State of Minnesota that 50 U.S.C.A.

841, 842 prohibit the Secretary of State from placing the plaintiff candidates on the Minnesota General Election ballot.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, as an eligible voter in the State of Minnesota, is denied the right to have the choice of voting for presidential candidate plaintiff Mrs. Charlene Mitchell and vice-presidential candidate plaintiff Mr. Michael Zagarell.

That your affiant, individually, and on behalf of the Communist Party of Minnesota retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent the plaintiff parties in this action for declaratory and injunctive relief.

Dated September 11, 1968.

MRS. BETTY M. SMITH

[Subscription omitted in printing.]

Affidavit of Michael Zagarell

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. MICHAEL ZAGARELL, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant resides at 390 First Street, Brooklyn, New York.

That your affiant is a candidate for the office of vice-president of the United States on the ticket of the Communist Party of the United States.

That on or about July 7, 1968, your affiant was nominated as the candidate for the office of vice-president of the United States, by the national convention of the Communist Party of the United States, assembled in New York, New York, to run in the 1968 United States presidential election to be held on November 5, 1968.

That your affiant was present at said convention, and participated in said convention when plaintiff Charlene

Mitchell was nominated as the candidate for the office of president of the United States on the ticket of the Communist Party of the United States.

By the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, signed by two thousand, three hundred and ninety-four (2394) eligible voters in the State of Minnesota, your affiant and plaintiff Charlene Mitchell are denied the right to appear as candidates for the office of president and vice-president of the United States on the November 5, 1968 election ballot of the State of Minnesota.

That your affiant, individually, and on behalf of the Communist Party of the United States retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent the plaintiff parties in this action for declaratory and injunctive relief.

Dated September 10, 1968.

MICHAEL ZAGARELL

[Subscription omitted in printing.]

Affidavit of James Erickson

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. JAMES ERICKSON, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 43 years of age and resides at 510 South Eighth Street, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of

Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

JAMES ERICKSON

[Subscription omitted in printing.]

Affidavit of Elmer Borman

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. ELMER BORMAN, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 82 years of age and resides at 122 West Grant, Apartment #4, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota,

and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

ELMER J. BORMAN

[Subscription omitted in printing.]

Affidavit of Trygve Larsen

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. TRYGVE LARSEN, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 74 years of age and resides at 630 Bryant Avenue North, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota,

and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

TRYGVE LARSEN

[Subscription omitted in printing.]

Affidavit of Earl Sorg

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. EARL SORG, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 52 years of age and resides at Route #2, Hastings, Minnesota.

That your affiant, on or about Tuesday, August 27, 1968 signed his name on a nominating petition for Communist Party of United States candidates for president and vice-president, to place the names of plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell on the ballot of the State of Minnesota as provided for by Minnesota law.

That your affiant is an eligible voter in the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition,

is denied the right to have the choice of voting for plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant wrote his post office address following his signature on the petition and that your affiant subscribed to the following oath, "I solemnly swear or (affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed the same of my own free will," as provided by M.S. 202.12.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

EARL SORG

[Subscription omitted in printing.]

Affidavit of Mrs. Lynn Stein

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. LYNN STEIN, being first duly sworn, deposes and says:

That she is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 36 years of age and resides at 68 Barton Avenue Southeast, Minneapolis, Minnesota.

That your affiant, on or about Tuesday, August 27, 1968, signed her name on a nominating petition for the Communist Party of the United States candidates for president and vice-president, to place the names of plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell on the ballot of the State of Minnesota, as provided for by Minnesota law, at the General Election November 5, 1968.

That your affiant is an eligible voter of the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of

Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the right to have the choice of voting for plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant wrote her post office address following her signature on the petition and that your affiant subscribed to the following oath, "I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed the same of my own free will," as provided by M.S. 202.12.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

LYNN STEIN

[Subscription omitted in printing.]

Affidavit of Fred Matsch

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. FRED MATSCH, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 22 years of age and resides at 1511 King Midas Lane, Hastings, Minnesota.

That your affiant is not a signer of the nominating petition for the Mitchell-Zagarell presidential and vice-presidential ticket.

That your affiant is an eligible voter of the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the right to have the choice of voting for

plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

FREDERICK L. MATSCH

[Subscription omitted in printing.]

Affidavit of Mrs. Betty M. Smith in Support of a Temporary Restraining Order

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota, and she is an eligible voter in the State of Minnesota.

That your affiant holds the office of Secretary of the Communist Party of Minnesota, an unincorporated association whose principal place of business is in Minneapolis, Minnesota, and which is the Minnesota-Dakotas District of the Communist Party of the United States, an unincorporated association whose principal place of business is in New York, New York.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly con-

vened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That your affiant was a participant in this convention which duly elected six (6) delegates and an alternate delegate to the national convention of the Communist Party of the United States held in New York on or about July 4-7, 1968.

That at the convention of the Communist Party of Minnesota a motion was passed that if the national Communist Party convention nominated a presidential ticket, that the Communist Party of Minnesota would endeavor to place the candidates on the ballot of the General Election in Minnesota, November 5, 1968.

That your affiant was an elected delegate, and did attend the national convention of the Communist Party of the United States.

That your affiant, for and on behalf of the Communist Party of the State of Minnesota, and in cooperation with the Communist Party of the United States and the staff of the Mitchell-Zagarell campaign committee, planned a tightly scheduled campaign program for candidates Mitchell and Zagarell in the State of Minnesota.

That there is less than two months time remaining of campaign time prior to the November 5, 1968 Minnesota General Election.

That your affiant believes that the Secretary of State of the State of Minnesota plans to order the ballots printed on October 7, 1968.

That if candidates Mitchell and Zagarell are not qualified to appear on the ballot, before October 7, 1968, by reason of the Secretary of State's refusal to accept the nominat-

ing petition, the Mitchell-Zagarell campaign plans will be necessarily suspended for over half of the campaign time remaining.

Dated September 11, 1968.

MRS. BETTY M. SMITH

[Subscription omitted in printing.]

Joint and Separate Answer of Defendants Joseph L. Donovan and Douglas M. Head and Affidavit of Forrest Talbott.

[Filed September 26, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

FIRST DEFENSE

1. The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

2. The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

3. Admit the allegations contained in paragraphs XI and XII of said complaint;

4. With respect to paragraph XVII, admit that a purported nominating petition was presented to defendant Secretary of State on September 9, 1968;

5. Admit the allegations contained in paragraph XVIII of said complaint, except insofar as said paragraph alleges that the defendant Donovan "wrongfully" refused to accept

said petition and except insofar as said paragraph alleges that said petition met all the requirements of law;

6. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XIV, XV, XVI of said complaint;

7. Deny the allegations of paragraph II of said complaint and allege with respect thereto that the Communist Party of the United States is not a national political party; that the Congress of the United States has determined and declared, Title 50, sections 841 and 842, United States Code, as follows:

"§ 841. Findings and declarations of fact

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to

party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed. Aug. 24, 1954, c. 886, §2, 68 Stat. 775.

§ 842. Proscription of Communist Party, its successors, and subsidiary organizations

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the

Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, § 3, 68 Stat. 776."

8. With respect to paragraphs XIX and XX of said complaint, admit that plaintiffs Communist Party of the United States, Mitchell and Zagarell, will not appear upon the ballot in the State of Minnesota in the forthcoming General Election; deny that said non-appearance on the ballot resulted from any illegal acts of defendants; and allege that the Communist Control Act of 1954, set forth in paragraph 7 of this Answer, prohibits the appearance of said plaintiffs on said ballot.

9. Deny each and every other allegation contained in said complaint.

WHEREFORE, defendants pray that said complaint be dismissed with prejudice and that they be awarded their costs and disbursements herein.

DOUGLAS M. HEAD
Attorney General

RICHARD H. KYLE
Solicitor General

DAVID J. BYRON
Special Assistant
Attorney General

By RICHARD H. KYLE
Attorneys for Defendants
160 State Office Building
St. Paul, Minnesota 55101
221-2961

Affidavit of Forrest Talbott

STATE OF MINNESOTA,
COUNTY OF RAMSEY, *ss.*:

FORREST TALBOTT being first duly sworn, deposes and says:

1. He is the Assistant Secretary of State for the State of Minnesota;

2. Pursuant to the direction of the Secretary of State, he is responsible for administration of the preparation of ballots for the general election to be held on November 5, 1968;

3. Approximately 1,700,000 paper ballots will be printed at an estimated cost of $7,000 to $8,000;

4. Approximately 10,000 paper ballots will be mailed to absentee voters, including approximately 5,000 to Minnesota residents presently in Vietnam;

5. Military authorities have informed your affiant that absentee ballots mailed to Vietnam must be mailed from the 87 county auditors no later than October 15, 1968;

6. Target date for actual receipt by the county auditors of state and presidential ballots is Monday, October 14, 1968;

7. A minimum of four 24-hour work days are required to accomplish the printing, assembling and distribution of ballots;

8. The time limit set by statute for withdrawal from the general ballot is 5:00 p.m., October 7, 1968;

9. The Secretary of State has determined that the anticipated large number of absentee voters in the general election favors that the printing of ballots commence at the close of business on Friday, October 4, 1968;

10. The presidential ballot is printed with the state ballot (M.S.A. §208.04) and a sample thereof is required to be filed in the office of Secretary of State "four weeks before the general election" for public inspection (M.S.A. §203.28, Subd. 3), and three weeks before such elections sample copies of the state ballots are required to be mailed to the auditor of each county;

11. "*At least* 15 days before the general election", the state ballots are required to be mailed to the auditor of each county. (M.S.A. §203.28, Subd. 3).

Further affiant sayeth not.

FORREST TALBOTT

[Subscription omitted in printing.]

Opinion of the Defendant Attorney General of the State of Minnesota Douglas M. Head to the Defendant Secretary of State Joseph L. Donovan Stating That 50 U.S.C.A. 841 and 842 (Communist Control Act of 1954) Bars the Plaintiffs From Appearing on the Ballot

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

September 9, 1968

You have requested our opinion as to whether you should accept for filing a nominating petition for presidential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of th. United States.

Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1954) which provides, in part, as follows:

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed."

Section 842 of the Communist Control Act declares that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or to any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . ."

In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings.

DMH:im

DOUGLAS M. HEAD
Attorney General
State of Minnesota

Written Refusal of the Defendant Secretary of State Joseph L. Donovan to Accept the Plaintiffs' Nominating Petition

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

September 9, 1968

TO ANY AND ALL PERSONS PRESENTING A NOMINATING PETITION OF THE COMMUNIST PARTY FOR FILING WITH THE SECRETARY OF STATE OF MINNESOTA FOR THE PURPOSE OF NOMINATING PRESIDENTIAL ELECTORS FOR THE GENERAL ELECTION OF 1968:

Please be advised that upon the advice of the Attorney General of Minnesota and at his direction as a matter of law, I hereby officially refuse and reject said petition.

JOSEPH L. DONOVAN
Secretary of State

Motion to Convene a Three-Judge Court

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

COMES NOW THE PLAINTIFFS, by their attorney, and move the Court for an order in the above-captioned cause convening a three-judge District Court pursuant to 28 U. S. C. A. 2282, 2284 because this action seeks an injunction to restrain the enforcement, operation or execution of an Act of Congress (50 U.S.C.A. 841 and 842) for repugnance to the Constitution of the United States.

The plaintiffs also move the Court for a temporary mandatory injunction requiring the Defendant Joseph L. Donovan to accept for filing the nominating petition of the Communist Party of the United States of America (Exhibit B in this action) and to file and acknowledge said petition, pursuant to M.S.A. 202.13 as of the date that it was duly tendered and refused, September 9, 1968.

Unless the Court orders the defendant Secretary of State Donovan to file the said nominating petition, the plaintiffs will suffer irreparable injury, loss and damage by reasons set forth in the affidavits herein, and the plaintiffs have no other adequate remedy at law.

If this temporary mandatory injunction be granted, the defendant Secretary of State Donovan and the State of Minnesota will suffer no injury.

Dated this 17th day September, 1968.

LYNN S. CASTNER
Attorney for Plaintiffs
Minnesota Civil Liberties Union
925 Upper Midwest Building
Minneapolis, Minnesota 55401
Phone ac 612, 333-2534

Of Counsel:

MELVIN WULF
Legal Director
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Order of Chief Judge Edward J. Devitt Convening a Three-Judge Court

[Filed September 19, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

You are hereby notified that in the above entitled cause on the 19th day of September, 1968, Designation of Circuit Judge Harry A. Blackmun, Chief District Judge Edward J. Devitt and District Judge Philip Neville to serve as members of a Three-Judge District Court (dated Sept. 16, 1968 signed by Chief Judge of the Eighth Circuit Martin D. VanOosterhout) was filed.

FRANK A. MASSEY
Clerk

By MARION G. HILGERT
Deputy Clerk

To:

MR. LYNN S. CASTNER
Minnesota Civil Liberties Union
925 Upper Midwest Bldg.
Minneapolis, Minnesota 55401
Attorney for plaintiffs

MR. RICHARD KYLE
Solicitor General
160 State Office Bldg.
St. Paul, Minnesota 55101

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Notice by Chief Judge Edward J. Devitt to the United States Attorney General as Required by U.S.C.A. §2403

[Filed September 24, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

You are hereby notified that in the above entitled cause on the 24th day of September, 1968, we filed the Court's certificate advising the U. S. Attorney General as to the constitutionality of an act of Congress affecting the public interest being drawn in question, and also notice of hearing for temporary injunction, copies of which are herewith enclosed.

FRANK A. MASSEY
Clerk

By LAWRENCE R. TAPPER
Deputy Clerk

To:

LYNN S. CASTNER
Minnesota Civil Liberties Union
925 Upper Midwest Bldg.
Mpls., Minn. 55401
Attorney for plaintiffs

MELVIN L. WULF, Legal Director
American Civil Liberties Union
156 5th Ave.
New York, N. Y. 10010
Attorney for plaintiffs

DOUGLAS HEAD, Attorney General
RICHARD KYLE, Asst. Atty. Gen.
State Capitol—160 State Office Bldg.
St. Paul, Minn. 55101
Attorney for defendants

ATTORNEY GENERAL OF THE UNITED STATES
Washington, D. C.
Attorney for the U. S.

PATRICK J. FOLEY, U. S. Attorney
596 U. S. Courthouse—110 S. 4th St.
Minneapolis, Minn.
Attorney for the U. S.

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Letter Directing Appearance in Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

OFFICE OF THE CLERK

ST. PAUL 55101

FRANK A. MASSEY, CLERK

September 12, 1968

Attorney General of the United States
Washington, D. C.

In re: Charlene Mitchell, et al. vs. Joseph L. Donovan, etc., et al. 3-68 Civil 256

Dear Sir:

Please find enclosed herewith a copy of order filed this date directing that you appear in this Court 9-17-68 at ten o'clock a. m. to advise the Court as to your official view of the constitutionality of the Communist Control Act of 1954, as it pertains to the issues involved in the above-described action.

We advised you of this order by teletype this afternoon.

Sincerely,

/s/ LAWRENCE R. TAPPER
Lawrence R. Tapper,
Deputy Clerk.

cc: Lynn S. Castner
Patrick J. Foley, U. S. Attorney
Attorney General, State of Minn.

Plaintiffs' Notice of Motion and Motion to Amend Complaint

[Filed October 9, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

Comes now the plaintiffs, by their attorney, and move the Court for an order in the above-captioned cause to allow amendment of the complaint by adding the following language after paragraph XXIV and before the Prayer for Relief:

XXV.

The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local, state, and national elections subsequent to the November 5 Minnesota General Election.

XXVI.

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their

endorsement from participating in any local, state, or national election in the State of Minnesota.

Dated this 9th day of October, 1968.

LYNN S. CASTNER
Attorney for Plaintiffs
Minnesota Civil Liberties Union
925 Upper Midwest Building
Minneapolis, Minnesota 55401
Phone ac 612, 333-2534

Of Counsel:

MELVIN WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Affidavit of Plaintiff Betty M. Smith in Support of Plaintiffs' Motion to Amend Complaint

[Filed November 22, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota and she is an eligible voter in the State of Minnesota.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters in Minnesota as a nominated candidate for the office of presidential elector, and she was duly qualified as a presidential elector candidate, together with the other nine (9) plaintiff presidential elector candidates, by the Communist Party of Minnesota.

That the Communist Party of Minnesota, in cooperation with the Communist Party, U.S.A., duly qualified by peti-

tion ten (10) presidential elector candidates in support of the Communist Party, U.S.A. presidential ticket Charlene Mitchell and Michael Zagarell which appeared on the Minnesota General Election ballot November 5, 1968.

That this Court, by a temporary restraining order dated October 2, 1968, ordered the defendant Joseph L. Donovan, as Secretary of State of Minnesota, to accept for filing the nominating petition of the plaintiffs.

That the defendant Joseph L. Donovan did accept for filing on or about October 2, 1968 the petition of the plaintiffs and that the Communist Party, U.S.A. presidential ticket did appear on the Minnesota General Election ballot November 5, 1968.

That the Communist Party of Minnesota participated in a number of state and local elections until and including the year 1949.

That in the 1950's and early 1960's the Communist Party of Minnesota did not participate in state and local elections because of the repressive political climate.

That the Communist Party of Minnesota discussed participation of the Communist Party candidates in state and local elections in 1964 and 1966, which participation did occur in some areas of the country.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly convened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That the Communist Party of Minnesota elected your affiant as a delegate to the national convention of the Communist Party, U.S.A. and your affiant did attend a national convention of the Communist Party, U.S.A. on or about July 4-7, 1968.

That following the national convention of the Communist Party, U.S.A. which endorsed the Mitchell-Zagarell presidential ticket, the Communist Party of Minnesota did campaign and participate in the 1968 national elections in Minnesota.

That your affiant, as Secretary of the Communist Party of Minnesota, states that the Communist Party of Minnesota will continue to participate in national, state, and local elections in the State of Minnesota.

Dated November 22, 1968.

BETTY M. SMITH

[Subscription omitted in printing.]

Defendants' Motion to Dismiss the Action as Moot

[Filed November 8, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

To: THE PLAINTIFFS, ABOVE NAMED and to LYNN S. CASTNER, THEIR ATTORNEY,

RAMSEY CLARK, JR., Attorney General of the United States,

PATRICK J. FOLEY, United States Attorney for the District of Minnesota.

PLEASE TAKE NOTICE: That at a Special Term of the above-named Court to be held in the United States District Court in the City of Saint Paul, Minnesota on the 25th day of November, 1968, at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, defendants, by their attorney, the Attorney General of the State of Minnesota, will move the Court for an Order:

Dismissing the above entitled action upon the ground and for the reason that the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this Court.

Said motion will be made and based upon all the files, records and proceedings herein and upon the affidavit hereto attached.

DOUGLAS M. HEAD
Attorney General

RICHARD H. KYLE
Solicitor General

DAVID J. BYRON
Special Assistant
Attorney General

By RICHARD H. KYLE
Attorneys for Defendants,
160 State Office Building
St. Paul, Minnesota 55101

Affidavit of Assistant Secretary of State for the State of Minnesota Forrest Talbott in Support of Defendants' Motion to Dismiss

[Filed November 8, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF RAMSEY, *ss.*:

FORREST TALBOTT being first duly sworn deposes and says:

1. He is the Assistant Secretary of State for the State of Minnesota;

2. Pursuant to the order of this Court dated October 2, 1968, Joseph L. Donovan, as Secretary of State of Minnesota, did accept for filing the nominating petition of the plaintiffs in this action, and he further caused the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968, general election;

3. A sample copy of the general election ballot prepared for the November 5, 1968, general election, is attached hereto as Exhibit A.

4. Said general election was held on November 5, 1968, and said general election ballot was used therein;

5. The next statewide general election for which the Secretary of State is charged with the preparation of ballots will be held in November, 1970.

Further affiant sayeth not.

FORREST TALBOTT

[Subscription omitted in printing.]

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF FORREST TALBOTT

SAMPLE BALLOT

FOR

GENERAL ELECTION

November 5, 1968

Joseph L. Donovan

Secretary of State

		Put an (x) opposite the name of the Presidential Candidate you wish to vote for, in the box indicated by the arrow.
		PRESIDENTIAL BALLOT MARK YOUR (X) IN ONE BOX ONLY
		NIXON AND AGNEW — Republican
		HUMPHREY AND MUSKIE — Democratic-Farmer-Labor
		WALLACE AND GRIFFIN — American Party Nominated by Petition
		HALSTEAD AND BOUTELLE — Socialist Workers Party Nominated by Petition
		BLOMEN AND TAYLOR — Industrial Government Party Nominated by Petition
		MITCHELL AND ZAGARELL — Communist Party USA Nominated by Petition
		CLEAVER AND TERRY — Peace and Freedom Party Nominated by Petition

Put an (x) opposite the name of each candidate you wish to vote for, in the square indicated by the arrow.

STATE BALLOT

FOR REPRESENTATIVE IN CONGRESS
FIFTH DISTRICT
VOTE FOR ONE

	HARMON T. OGDAHL — Republican
	DONALD M. FRASER — Democratic-Farmer-Labor
	WILLIAM C. BRAATZ — Industrial Government Party Nominated by Petition
	DAVID THORSTAD — Socialist Workers Party Nominated by Petition

FOR PUBLIC SERVICE COMMISSIONER
VOTE FOR ONE

	LYLE D. NELSON — Republican
	PAUL A. RASMUSSEN — Democratic-Farmer-Labor

FOR ASSOCIATE JUSTICE OF SUPREME COURT

FOR THE OFFICE OF ASSOCIATE JUSTICE OF SUPREME COURT TO WHICH WILLIAM P. MURPHY WAS ELECTED FOR THE REGULAR TERM
VOTE FOR ONE

	WILLIAM P. MURPHY — Incumbent Nominated Without Party Designation

FOR THE OFFICE OF ASSOCIATE JUSTICE OF SUPREME COURT TO WHICH [illegible] WAS ELECTED FOR THE REGULAR TERM
VOTE FOR ONE

[illegible] — Incumbent

Transcript of the Hearing Before Chief Judge Edward J. Devitt on Plaintiffs' Motion to Amend the Complaint and the Defendants' Motion to Dismiss as Moot Heard [pages 7 and 8]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

November 25, 1968

The Court: On another subject, I notice that counsel's affidavit says on information and belief he has learned that you, or the attorney general, are going to persist in your viewpoint so that if some other Communist affiliated people file, you are going to take the same position.

Is there any basis for this information and belief?

Mr. Kyle: I think there probably is. At least there is no new case law which has come down which would, as far as I am concerned, dictate a different result, ultimately.

Transcript of the Hearing Before Chief Judge Edward J. Devitt on Plaintiffs' Motion to Amend the Complaint and Defendants' Motion to Dismiss as Moot Heard [page 12, line 24 through page 15, line 4]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

November 25, 1968

Castner: And this brings us to what we feel is the central issue for the Court to determine, is there a controversy remaining in this case after the—after the Court has granted temporary relief?

We strongly feel that there is, and there is a case precisely in point, the Socialist Labor Party vs. Rhodes in a three-judge District Court in Ohio, cited to the Court in our briefs, which was paralleling our own case in this election, went to the United States Supreme Court and the United States Supreme Court granted temporary relief ordering the Socialist Labor Party and Governor Wallace, which was a separate case heard at the same time, placed on the Ohio ballot.

Now, that court retained jurisdiction to face the question of the constitutionality of the state laws in Ohio which made it difficult for third-party candidates to arrive on the ballot.

I think the same arguments can be made and the same equities are present with the Socialist Labor Party—in this state it's called the Industrial Government Party and the Communist Party. They're both small in size, they both have the same interests, though not the principles and platforms, but the same equities, I would argue, in participation in election, and the U. S. Supreme Court felt that the presence of laws on the books, in this case, state laws, and under United States code section 2281 they called for convening with a three-judge District Court, that their state laws and the disability that they placed on this party was sufficient to have the court continue to have jurisdiction, and we expect that there will be a decision.

For the same reason, we ask the three-judge court here to make a decision on the merits of the Communist Control Act of 1954. The election has passed, there might be another attorney general during the pendency of the action. If the court decides to retain jurisdiction and study, in a closer fashion, the merits of the Communist Control Act of 1954—

But we argue that this fact can operate to disable these plaintiffs not only in Minnesota but throughout the country, and if we are placed in the position of bringing an action each time, the attorney general could argue to the court that all you have to do is give them temporary relief, whether it's this court or a state court, if it happened to be another question, and a third party could be placed in the position of bringing a lawsuit each time it wanted to participate in an election, and stopping short of the decision of the merits of the law, which is being used to bar them from the ballot.

It is the Communist Control Act and only the Communist Control Act which the defendants have relied upon to bar the Communist Party from the ballot.

As long as that is so with this defendant, we feel it is incumbent upon the Court to make a decision of the merits of the constitutionality of that law.

Opinion and Judgment of Three-Judge Court on October 2, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

vs.

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

PATRICK J. FOLEY, United States Attorney for the District of Minnesota, Minneapolis, Minnesota, as *Amicus Curiae.*

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

This expression is occasioned by the complaint of the Communist Party candidates for President and Vice-President of the United States and others allied with them in interest[1] against Joseph L. Donovan who, as the Secretary of State of Minnesota, is the public official charged with the administration of the election machinery of the State, and Douglas M. Head, Attorney General of Minnesota, growing out of the refusal of Secretary of State Donovan to accept for filing the nominating petition for the presidential and vice-presidential candidates of the Communist Party.

The plaintiffs request temporary and permanent relief ordering Secretary of State Donovan to accept the tendered nominating petition (which allegedly contains the names of 2,394 qualified electors of the State of Minnesota), and to place the names of the Communist Party candidates on the 1968 general election ballot. Further relief is requested in the form of a declaration of the inapplicability, or in the alternative the constitutional invalidity, of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. This law is the apparent authority for the Secretary of State's refusal to accept the plaintiffs' petition.

At a hearing held September 17, 1968, briefs were filed and arguments heard relating to the jurisdiction of the court over the subject matter of the controversy and the necessity and propriety of convening a statutory three-judge court. While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are

[1] The other plaintiffs are: The Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U. S. C. A. §§1331, 1343, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U. S. C. A. §§2282, 2284. *Flast* v. *Cohen*, 392 U. S. 83, 88 S. Ct. 1942 (1968).

Circuit Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit, Chief District Judge Edward J. Devitt, and District Judge Philip Neville, both of the District of Minnesota, the judges designated under authority of 28 U. S. C. A. §§2282 and 2284, heard oral arguments on the issues on September 30, 1968, following notice given on September 24, 1968 to counsel for all parties and to the United States Attorney for the District of Minnesota. In accordance with the provisions of 28 U. S. C. A. 2403, the Attorney General of the United States was notified by the court that the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, was drawn in question, and was advised that he would be permitted to intervene for the presentation of evidence, if evidence were otherwise admissible in the case, and for arguments on the question of the constitutionality of the law.

Extensive briefs have been filed on the questions of jurisdiction, the necessity that the matter be determined by a statutory three-judge court, the granting of preliminary relief, and the applicability of, and the constitutionality of, the Communist Control Act of 1954.

It is not unlikely that a decision on the merits of this matter would involve a determination of the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. Since the passage of that Act there has been scant judicial or legislative consideration of its meaning

and scope. In essence, the law contains a finding that the Communist Party and its adjuncts are a menace to the United States and should be outlawed (§841), and expresses a determination that the rights, privileges, and immunities normally attendant upon such bodies are terminated (§842).

The interdiction is broad and general in its terms, and jabs at the very core of our traditional constitutional freedoms. It is thus not a matter to be considered lightly. Its breadth and generality render its applicability to situations like the present a question not admitting of hurried solution. The results of a determination of the relevant issues on their merits may well have far-reaching national effect. The constitutionality of the Act is not settled, nor have the issues apparently involved in this case ever received authoritative judicial consideration. The Supreme Court of the United States has interpreted the Act on only one occasion. *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389, 81 S. Ct. 1465 (1961). In that case a decision on the constitutional question involved was avoided. But the court did imply a criticism of "the vague terminology" of §842 of the Act. The court observed that:

> "The statute contains ino definition, and neither committee reports or authoritative spokesmen attempt to give any definition, of the clause 'rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof.'" 367 U. S. at 392, 393.

The question of validity of the Act, while not passed upon, was noted to contain "novel constitutional questions." 367 U. S. at 393. These observations might well be taken as a skeptical, if not jaundiced, view of the constitutional validity of the Act.

An examination of the expressions of the United States Supreme Court in other cases involving the control of allegedly subversive organizations, and cases in other areas involving similar constitutional doubts, may well be looked to as a harbinger of the probable view of the court if called upon in an appropriate case to pass upon the constitutionality of the Communist Control Act of 1954.

Because attempted legislative control of subversive groups and activities often involves curtailment of fundamental constitutional freedoms, the Supreme Court has required that the standards of clarity and specificity be applied with particular stringency to such statutes. At least two provisions of the Subversive Activities Control Act of 1950, sections which on their face are narrower and more specific than the statute here involved, have been stricken down as vague and overbroad. *United States* v. *Robel,* 389 U. S. 258, 88 S. Ct. 419 (1967); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 84 S. Ct. 1659 (1964). See also, Note, "Recent Developments in Communist Control Act Prosecutions," 16 W. Res. L. Rev. 206 (1964).

In the case before us, issues involving rights of suffrage, free speech, and free association are involved. Only the most delicate control in such areas is to be tolerated. *Whitehill* v. *Elkins,* 389 U. S. 54, 88 S. Ct. 184 (1967); *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328 (1963); *Cramp* v. *Bd. of Publ. Instr. of Orange Cty., Fla.,* 368 U. S. 278, 82 S. Ct. 275 (1961). Legislative exclusions of the sort here being considered may be bills of attainder. *United States* v. *Brown,* 381 U. S. 437, 85 S. Ct. 1707 (1965).

The complaint, affidavits, briefs, and the oral arguments presented have raised substantial doubts regarding the Act's applicability and constitutional validity. These doubts are of sufficient proportion to warn that hurried

arguments and precipitous decision of the issues would be unwise.

A "Memorandum for the United States as Amicus Curiae," has been filed over the signature of Patrick J. Foley, United States Attorney, advising that in his view the Communist Control Act is inapplicable to this case. He urges that the Act is meant to disable the Communist Party as a party only and not its members, and he suggests that the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depend in no degree on their status as nominees of the national or local Communist Party. He argues that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concludes that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It is therefore his view that the Communist Control Act of 1954 does not prohibit the Secretary of State from accepting the nominating petitions and including the nominees upon the ballot as candidates of the Communist Party.[2]

The Government also cites the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood, supra,* and urges that we should "hesitate long" before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394.

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[2] At least one court, when presented with a similar problem, has observed that the Act reaches only to the prevention of the specific label, "Communist Party," from appearing on the ballot. *Salwen* v. *Rees,* 16 N. J. 216, 108 A. 2d 265 (1954).

The brief of the United States admits the seriousness of many of the plaintiffs' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Congress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions.

Because of the grave doubts which exist as to the constitutionality of the Communist Control Act, and in light of the amicus curiae position of the United States Attorney as to the inapplicability of the Act to the situation here, and his strong suggestions regarding its constitutional infirmities, it would be unwise for us, on such short notice, to attempt to resolve the issues on their merits. Additionally, it should be noted that the Attorney General of the United States, upon receipt and consideration of the statutory notice sent to him pursuant to 28 U. S. C. A. §2403, as to the pendency of the constitutional issues, may care to intervene, offer evidence, and make argument as he has a right to do. He should be afforded sufficient opportunity and time to present his views. See also, 28 U. S. C. A. §§516 and 517.

But, time is of the essence here. If a decision on the merits were not reached by October 7, 1968, probably the last date when the ballots must be delivered to the printer, the nominated candidates would not have a place on the printed ballot for the November 5, 1968 general election, and the plaintiffs, assuming some merit in their contentions, would be deprived of their individual constitutional rights. The plaintiffs have also sought to show that the lack of an expeditious resolution of the issues involved will

substantially impede their proposed electioneering campaign in Minnesota.

On the other hand, the defendants have not urged, nor is there apparent, any grave or irreparable harm which would result from the grant of the requested temporary relief directing the placement of the Communist Party ticket on the ballot pending final disposition of the issues. It has been there several times before with unimpressive voter response.[3]

Thus, while the court finds and concludes that possible serious injury will accrue to the plaintiffs if the names of Charlene Mitchell and Michael Zagarell as Communist Party candidates for President and Vice-President do not appear on the printed ballot, it has found no discernible probable injury which the defendants or the citizens of Minnesota will suffer if these names are placed on the ballot. A well-informed, intelligent electorate such as exists in the State of Minnesota undoubtedly will be able fairly to discern and make appropriate decision upon the merits of the principles advocated by the Communist Party candidates and their sponsors.

IT IS THEREFORE ORDERED

That the defendant, Joseph L. Donovan, as Secretary of State of Minnesota, absent any prohibitive Minnesota law,

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[3] According to the records in the office of the Minnesota Secretary of State, the Communist Party vote for President in Minnesota for the years 1924-1940 is as follows:

			Voting
1924	William Z. Foster—Workers Party	4,427	835,002
1928	William Z. Foster—Workers Communist	4,853	999,823
1932	William Z. Foster—Communist	6,101	1,003,009
1936	Earl Browder—Communist	2,574	1,120,179
1940	Earl Browder—Communist	2,711	1,257,491

accept for filing the nominating petition of the plaintiffs and, if upon examination thereof he determines that the petition complies in all respects with the requirements of the pertinent Minnesota statutes, he is directed to cause the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968 general election.

This expression is intended to comply with Rule 52 of the Federal Rules of Civil Procedure.

The Clerk is directed to return the nominating petition to plaintiffs' counsel.

Dated: October 2, 1968.

HARRY A. BLACKMUN
Harry A. Blackmun, *Circuit Judge*

EDWARD J. DEVITT
Edward J. Devitt, *Chief District Judge*

PHILIP NEVILLE
Philip Neville, *District Judge*

Neville, District Judge.

I concur in the action taken by the court since it grants purely temporary relief. Personal disagreement on my part with the philosophy and teachings of Communism obviously does not furnish an answer to the question presented in this lawsuit. Assuming, as I do, the validity and truth of the findings made by Congress and recited in the Communist Control Act of 1954, the court nevertheless is urged by plaintiffs to declare the Act unconstitutional. Congress declared the Communist Party to be "an instrumentality of a conspiracy to overthrow the Government of the United States," whose policies and programs "are secretly prescribed for it by the foreign leaders of the world Communist movement." Its existence was found to be "a clear present and continuing danger to the security of the United States" and the statute concludes "Therefore, the Communist Party should be outlawed."[1] The question of the validity of the Communist Control Act goes to the very bowels of our constitutional framework.

I would prefer to bottom jurisdiction on 42 U. S. C. §1983 (Civil Rights Act) and 28 U. S. C. §1343 rather than on 28 U. S. C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted "under color of [a] statute" of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition[2] did not

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[1] 50 U. S. C. §841.

[2] Minn. Stat. §202.09.

apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much "action under color of law" as is the reverse. Also I agree that a three-judge court is proper.

I take issue with the court's opinion insofar as it expresses *grave* doubts as to the constitutionality of the Communist Control Act. I do not mean to say that it is free from all doubt. Further I believe that the United States Supreme Court, if and when it considers this case, may well conclude that if it permits the Communist Party to be on the ballot little, if anything, will be left of the Communist Control Act. Nevertheless I subscribe to the temporary relief granted by this court because of the shortness of time, the inability fully to study the problem and all its facets, and the belief that, balancing the equities, less harm results from granting the temporary relief than denying it.

Philosophically in a true democracy the majority should rule and whatever it votes or determines should prevail. Yet inherent in this concept are the seeds of self-destruction. Should the majority vote into power persons who avowedly urge and effect the overthrow of the present form of government, then no longer is there a democracy or the Republican Form of government guaranteed to the states by the United States Constitution.[3] Under the "clear and present danger" test prescribed by Holmes,[4] Congress found, or at least expressed the fear, that such might happen.

Philosophers and political scientists have pointed to the "paradox of freedom" and have held to the view that the

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[3] U. S. Const. art. IV §4.

[4] *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

principle of freedom cannot require that one can make the decision not to be free. It is not freedom to be allowed to destroy freedom.[5] It has been said that the best test of truth is the power of thought to get itself accepted in the marketplace. Many contend, however, that a democratic form of government should protect its freedom from those who disbelieve in its theory and would abandon and deny traditional civil liberties.

The court's opinion herein notes that the Supreme Court has held restrictions on the activities of individual Communists unconstitutional in situations where the statute attempted to prohibit an avowed Communist from working in a defense plant;[6] from holding an office in a labor union;[7] from obtaining a passport;[8] and in another case where benefits were sought to be denied the Communist Party as an employer under state unemployment laws.[9] These cases are, it seems to me, distinguishable, and relate to the movement and civil rights of particular individuals and are quite separate from and not precedent for the question of whether by the ballot we should give our democracy the right by democratic process to vote to destroy itself.

This most difficult question need not be and is not now decided. I feel, however, that while doubts as to constitutionality are not nearly as grave as the court's opinion

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[5] See Auerbach, The Communist Control Act of 1954, 23 U. CHI. L. REV. 173 (1956) containing a discussion at 188 et seq. on the freedom to abdicate liberty. A number of writers holding generally to this view are cited and quoted. See also Comment, The Communist Control Act of 1954, 64 YALE L. J. 712, 738 (1955).

[6] *U. S.* v. *Robel*, 389 U. S. 258 (1967).

[7] *U. S.* v. *Brown*, 381 U. S. 437 (1965).

[8] *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

[9] *Communist Party* v. *Catherwood*, 367 U. S. 389 (1961).

would indicate,[10] small harm can come from permitting the candidates to be on the ballot for this particular election; whereas if they are excluded and the court should be in error in such a decision some persons will have been deprived of their right to be candidates and others of their right to vote for such candidates. Therefore, I concur.

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[10] *Dennis* v. *United States*, 341 U. S. 494, 509 (1951), wherein the Court said:

> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the Government is required."

But see *Communist Party* v. *Control Board*, 367 U. S. 1 (1961), dissenting opinion of Justice Black at 137:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ."

Opinion and Judgment of Three-Judge Court on July 14, 1969

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA—THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

—vs.—

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, and DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief based on issues arising from the conduct of the

1968 Presidential Election in Minnesota as it pertained to candidates running under the banner of the Communist Party. Defendants move for dismissal, asserting mootness.

This action, for injunctive and declaratory relief, was commenced in September, 1968 by Charlene Mitchell, the Presidential candidate of the Communist Party, and others,[1] against Secretary of State Donovan and Attorney General Head, of the State of Minnesota. The plaintiffs sought an order requiring Secretary Donovan to place the names and party designation of the Communist Party candidates for President and Vice-President of the United States on the ballot for the general election of November 5, 1968. Additionally, the plaintiffs sought a declaration that the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, the purported authority for the defendants' refusal to accept plaintiffs' nominating petition, is inapplicable to the present situation, or in the alternative, is constitutionally invalid.

In response to the original complaint, probable jurisdiction was noted, 28 U. S. C. A. §1343, and a statutory three-judge court was convened, 28 U. S. C. A. §§2282, 2284, to consider further the issues raised by the pleadings. After oral arguments, and study of briefs from the parties and the United States Attorney as *amicus curiae*, the court, in a memorandum opinion and order dated October 2, 1968, granted temporary relief in the form of an order directing defendant Donovan, as Secretary of State of Minnesota, to accept for filing the nominating petition of plaintiffs, and upon a finding that the petition complied

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[1] The other plaintiffs are: the Vice-presidential candidate of the Communist Party, the Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

in all respects with the pertinent Minnesota statutes, to place the names of plaintiffs Mitchell and Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States on the ballot for the November 5, 1968 general election. That Memorandum and Order, containing a more detailed exposition of facts and reasoning, is reported as *Mitchell* v. *Donovan,* 290 F. Supp. 642 (D. Minn. 1968).

By affidavit with attached exhibits, it appears that defendant Donovan complied with the order of this court, and that the November 5, 1968 general election ballot contained the names "Mitchell and Zagarell" with the subdesignation "Communist Party USA/Nominated by Petition." [2]

On October 10, 1968, the plaintiffs moved to amend their complaint by adding allegations that the Communist Party plans to participate in Minnesota local, state, and national elections which occur after November 5, 1968, and that upon "information and belief," it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections.

One week after the November 5, 1968 general election the defendants moved to dismiss the complaint on the ground that "the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this court."

In our view the issues raised by the original pleadings are now moot since the 'plaintiffs' nominating petitions

[2] The plaintiff Mitchell and her running mate tallied 415 votes.

were accepted and their names and their party designation were placed on the ballot for the 1968 Presidential elections.

By their tendered amendment to the complaint, plaintiffs seek to have us rule for the future on the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842, on the theory that Communist Party candidates may seek some position on a Minnesota ballot in some future election and that the person who is Attorney General of Minnesota at that time may take a position that the provisions of the Communist Control Act of 1954 prevent such filing.

We readily allow the motion to amend the complaint, yet view the issues thus shaped as inappropriate for adjudication and dismiss the complaint because, in our view, such issues do not present a "controversy" as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U. S. C. A. §2201.[3]

It is fundamental that the Declaratory Judgment Act provided a judicial remedy, but did not repeal the cardinal standard of federal jurisdiction that a federal court may not decide what is not a "case or controversy." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510 (1941); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937). In *Maryland Casualty*, the Court said:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judg-

[3] "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

ment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 312 U. S. at 273.

That constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,

"the Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Assoc., Inc.* v. *Rickover,* 369 U. S. 111, 112, 82 S. Ct. 580 (1962).

Put in another way, the Declaratory Judgment Act,

"is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Ser. Comm'n of Utah* v. *Wycoff Co.,* 344 U. S. 237, 241, 73 S. Ct. 236 (1952).

Here are guideposts which the United States Supreme Court has set as to when declaratory relief should be granted.

"(W)hen all of the axioms have been exhausted and all the words of definition have been spent, the propriety of declaratory relief in a particular case will

depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the function and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting the relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature intervention, especially in the field of public law. A maximum of caution is necessary in the type of litigation we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Ser. Comm'n of Utah* v. *Wycoff Co., supra,* 344 U. S. at 243-4.[4]

Applying these principles to this case, it appears to us that no issue is here ripe for decision; that a disagree-

[4] Chief Justice Hughes expressed similar principles many years before in *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227 (1937) as follows:

"The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' (citations omitted) . . .

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal

ment, if it exists between the litigants, is nebulous and conjectural, not fixed and final in shape; and that no useful purpose would be served by a declaration of rights.

It is not at all certain that candidates will seek to run on the Communist Party Ticket at the next or at subsequent elections, albeit the affidavit of Mrs. Betty M. Smith, the State Secretary of the Minnesota Communist Party, alleges such future intention. From 1949 to 1968, no person sought to run on the Communist ticket in Minnesota for any public office. Of course, it is certain that future elections will be staged in Minnesota, but the bare certainty that future elections will be held is not enough *Fair* v. *Dekle,* 367 F. 2d 377 (5th Cir. 1966), *cert. den.* 386 U. S. 996.

But even assuming that some candidate were to run for some office under the label of the Communist Party at some future election, it is not certain that at such future election the then Attorney General of Minnesota will be the same person who now holds that office or, if so, that he will take the same legal position that was taken by the Minnesota Attorney General in connection with the 1968 election. The present Minnesota Attorney General has not said he will view the Communist Control Act of 1954 as prohibiting persons from seeking ballot positions in future elections. In view of the now expressed opinion of the legal officers of the United States Government that the Communist Control Act of 1954 does not apply to the plaintiffs, it is doubtful if the Attorney General of Minnesota will presume to take a contrary position involving the interpretation of this federal statute at a future election.

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interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 300 U. S. at 239-241.

The plaintiffs cite several decisions involving voting rights cases, particularly some just decided or now pending in the United States Supreme Court[5] as authority for the proposition that this court should entertain and adjudicate this case. In each of the cited cases, however, the plaintiffs were suffering under an adverse lower court ruling, the appeals were all perfected prior to the November 5, 1968 election, the issues were fixed and final in shape, and most important of all, these cases involve firmly-imbedded state policies concerning election rights as expressed in the statutes of the States involved.

There is no firmly-imbedded state policy in Minnesota as expressed by statute or otherwise at issue here, but only the possibility of a future adverse legal opinion by a then Attorney General of Minnesota on an uncertain issue as yet unformed. The statute involved is a federal, not a state, one. As noted, the view of the chief legal officer of the United States, speaking through his United States Attorney, is that the constitutionality of the Communist Control Act of 1954 is not involved and, in his view, the statute by its application does not prohibit the plaintiffs from the positions on the ballot which they sought.

So, in summary,

1. The issue as originally framed is moot because the election is over and plaintiffs were on the ballot as requested.

2. As to the future, there is no certainty or finality as to the issues sought to be adjudicated because there is no

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[5] See e.g., *Moore* v. *Ogilvie*, —— U. S. ——, 89 S. Ct. 1403, 37 U. S. L. W. 4389 (May 5, 1969); *Hadnott* v. *Amos*, —— U. S. ——, 89 S. Ct. 1101 (1969); *Allen* v. *State Board of Electors*, 393 U. S. 544, 89 S. Ct. 817 (1969); *Brockington* v. *Rhodes*, probable jurisdiction noted, 393 U. S. 1078, 89 S. Ct. 877 (1969).

certainty as to whether any future candidates for office in a Minnesota election may seek to run under the banner of the Communist Party and if they do, that the issues formed by their attempted filing may be the same as they are in this lawsuit. Further, there is certainty that the issues sought to be adjudicated in the present lawsuit will be similarly viewed by the Attorney General of Minnesota holding office at the time of a future election. The issues as raised by the pleadings do not represent any fixed or firm state policy governing elections which should be examined. In our view, therefore, the issues upon which decision is requested here, are nebulous and contingent—not fixed and final—as required by the Supreme Court.

3. At all events, no constitutional issue has been definitely joined in the present lawsuit because the United States Attorney General, charged with the duty of defending the constitutionality of the statutes of the United States, expressed the view that no constitutional issue was present and agreed with the plaintiffs that a proper interpretation of the law is that the plaintiffs were entitled to be placed on the ballot at the 1968 election as they requested. The United States Attorney General agrees with the plaintiffs' view of the law: the Minnesota Attorney General, by his motion for dismissal, does not care to contest the issue. In such a stance, who is there to oppose the plaintiffs?

4. No useful purpose would be served by a declaration of rights.

In the words of Justice Brennan, in a most recent decision of the United States Supreme Court, the constitutional question, if one exists,

". . . must be presented in the context of a specific live grievance." *Golden v. Zwickler*, —— U. S. ——, 89 S. Ct. 956, 960 (1969).

And, as the United States Supreme Court said in *United Public Workers of Amer. (CIO) v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556 (1947):

"The power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." 330 U. S. at 89-90.

All the plaintiffs assert here is a "hypothetical threat" of a possible constitutional issue as yet unframed.

There is no "actual controversy" as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act.

The complaint is therefore DISMISSED.

Dated: 7/14/69

HARRY A. BLACKMUN, *Circuit Judge*

EDWARD J. DEVITT, *Chief District Judge*

PHILIP NEVILLE, *District Judge*

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IN THE

Supreme Court of the United States

October Term, 1969
No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

vs.

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

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IN THE

Supreme Court of the United States

October Term, 1969
No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

vs.

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

Come now appellees, Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C., by counsel, and for the reasons stated and upon the authority contained in the attached and incorporated brief in support hereof, move this Court to dismiss the above-captioned appeal or, in the alternative, to affirm the judgment entered below.

As ground whereof appellees aver and allege the following:

1) The three-judge District Court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine the issues below, based its jurisdiction over the subject matter upon 28 U.S.C. § 1331, Subject matter jurisdiction under 28 U.S.C. § 1331 is lacking as there is nothing in the original or amended complaint of appellants to indicate, or from which it may be inferred, that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs as is required by that statute. Subject matter jurisdiction is lacking under 28 U.S.C. § 1343(3), and 42 U.S.C. § 1983, as appellees at no time acted under color of state law.

2) The three-judge District Court was convened pursuant to 28 U.S.C. § 2282. Such was an improper basis upon which to convene the panel in that the relief requested by appellants in their original and amended complaints did not call for the restraint of the operation, enforcement, or execution of an Act of Congress on the basis of its constitutional repugnancy. As a consequence, a direct appeal to this Court from the judgment entered below is not allowed by 28 U.S.C. § 1253.

3) A direct appeal to this Court pursuant to 28 U.S.C. § 1253 is not permissible, because the order dismissing the complaint could and did refer only to the prayer for declaratory relief, the prayer for injunctive relief having been rendered moot by the general election of November 5, 1968.

4) The judgment below, dismissing the prayer for declaratory relief for mootness and for lack of an actual justiciable controversy, manifests a proper exercise of judicial discretion given the facts and circumstances presented to the three-judge District Court.

5) The three-judge District Court did not pass upon the claimed constitutional infirmities alleged to exist with respect to the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842. As such, this Court should refuse to hear this appeal to determine the soundness of appellant's constitutional claims, for to do so in this context would require an impermissible advisory opinion.

Respectfully submitted,

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IN THE

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CHARLENE MITCHELL, *et al.*,

Appellants,

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JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

Pursuant to U.S. Sup. Ct. Rule 19, 28 U.S.C., the appellees, Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, submit this brief in support of the attached and incorporated "Motion to Dismiss, or in the Alternative, to Affirm the Judgment Entered Below" which judgment was entered by a three-judge District Court dismissing the above-captioned complaint as moot.

OPINIONS BELOW

An initial opinion, dated October 2, 1968, which granted a requested Order requiring appellee, Joseph L. Donovan, to place the names of appellant presidential and vice-presidential candidates on the November 1968 Minnesota general election ballot is reported at 290 F. Supp. 642 (D. Minn. 1968), and is accurately set forth at pp. 25-37 of the Appendix to Appellants' Jurisdictional Statement. The opinion from which this appeal arises, also set forth accurately at pp. 38-47 of the Appendix to Appellants' Jurisdictional Statement, is reported at 300 F. Supp. 1145 (D. Minn. 1969).

JURISDICTION

Appellants initiated this action in the United States District Court for the District of Minnesota for a temporary and permanent injunction requiring the Minnesota Secretary of State to accept nominating petitions of appellants and to place the names of appellants Mitchell and Zagarell on the November 1968 Minnesota general election ballot; and for a declaratory judgment that the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842, is unconstitutional and void.

The action was commenced under 28 U.S.C. § 1331; 28 U.S.C. 1343 (3) and (4); 42 U.S.C. §§ 1981, 1983, and 1988; and 28 U.S.C. §§ 2282 and 2284.

Arguments were heard on September 17, 1968, by the Honorable Edward J. Devitt, Chief Judge of the District Court, relating to subject matter jurisdiction and the necessity of convening a statutory three-judge Court. Probable jurisdiction was noted pursuant to 28 U.S.C. §§ 1331 and 1343, and a three-judge District Court was ordered convened under the provisions of 28 U.S.C. §§ 2282 and 2284. The three-judge

Court granted a temporary injunction on October 2, 1968 which directed appellee Donovan to accept the appellants' nominating petition and to place their names on the November 5, 1968 general election ballot. *Mitchell v. Donovan*, 290 F. Supp. 642, 646 (D. Minn. 1968). The Court's order was complied with in all respects. *Mitchell v. Donovan*, 300 F. Supp. 1145, 1146 (D. Minn. 1969).

Prior to the general election (on October 10, 1968), appellants moved to amend their complaint by adding the allegations that the Communist Party plans to participate in Minnesota local, state and national elections held subsequent to November 5, 1968, and that

> ". . . upon 'information and belief,' it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U.S.C.A. §§ 841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections."

Mitchell v. Donovan, 300 F. Supp. 1145, 1147.

One week subsequent to November 5, 1968, appellees moved to dismiss the complaint on the basis that the issues involved in the litigation had become moot and that there no longer existed justiciable issues. The motion to amend the complaint was granted, *Id.* p. 1147, as was the motion to dismiss. *Id.* At no time did the three-judge District Court pass upon the merits of appellants' constitutional claims with respect to 50 U.S.C. §§ 841 and 842. Therefore, the final order of the three-judge District Court, which dismissed the prayer for declaratory relief on the grounds of mootness and lack of an actual justiciable controversy, and which did not interdict the operation, enforcement or execution of the federal statute on the

basis of its constitutional repugnancy, is not appealable directly to this Court pursuant to 28 U.S.C. § 1253.

STATUTES INVOLVED

In addition to 50 U.S.C. §§ 841 and 842 set forth by appellants at pp. 3-5 of the Jurisdictional Statement, the following federal statutes are involved: 28 U.S.C. §§ 1331; 1343 (3) and (4); 2282; 1253; and 2201; and 42 U.S.C. § 1983.

28 U.S.C. § 1331 provides in relevant part:

"§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *"

28 U.S.C. § 1343 provides, in relevant part:

"§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for

the protection of civil rights, including the right to vote."

28 U.S.C. § 2282 provides:

"§ 2282. Injunction against enforcement of federal statute; three-judge Court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C. §1253 provides:

"§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 2201 provides:

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such decla-

ration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

42 U.S.C. § 1983 provides:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

Appellees consider that the question raised by this appeal may be more properly framed as follows:

1) Whether the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, lacked jurisdiction over the subject matter of the controversy under 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), or 42 U.S.C. § 1983.

2) Whether the three-judge District Court was improperly convened pursuant to 28 U.S.C. §§ 2282 and 2284, as the relief requested did not require restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution of the United States.

3) Whether a direct appeal to this Court is permissible pursuant to 28 U.S.C. § 1253, in that the dismissal of the complaint refers only to the prayer for declaratory relief, the prayer for injunctive relief having been rendered moot by the general election.

4) Whether, if the three-judge District Court possessed the requisite subject matter jurisdiction, it properly dismissed the prayer for declaratory relief on the grounds that the questions presented were moot, and that there did not exist an actual justiciable controversy.

5) Whether, because the three-judge District Court did not pass upon the claimed constitutional repugnancy of 50 U.S.C. §§ 841 and 842, it would require an impermissible advisory opinion by this Court, given the context of this case, for the constitutional challenges to be decided at this time.

STATEMENT OF THE CASE

Appellees accept, with two reservations, appellants' "Statement of the Case." With respect to the observations and position of the United States Attorney for the District of Minnesota as such were purportedly found by the three-judge District Court, this Court's attention is directed, respectfully, to *Mitchell v. Donovan*, 290 F. Supp. 642, 644-645. Further, it is alleged at p. 8 of appellants' Jurisdictional Statement that:

> "The written opinion of the State Attorney General stated that the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842, bars the Secretary of State from accepting and filing the nominating petition submitted by the Communist Party of Minnesota and the Communist Party, U.S.A. (Affidavit of Lynn S. Castner, September 11, 1968)."

The memorandum of Attorney General Head to Secretary Donovan in question, dated September 9, 1968, states, in its entirety, as follows; and it speaks for itself:

> "You have requested our opinion as to whether you should accept for filing a nominating petition for presi-

dential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of the United States.

"Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1964) which provides, in part, as follows:

'The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed.'

"Section 842 of the Communist Control Act declares that:

'The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivisions thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . .'

"In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts

relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

The above memorandum was submitted to appellee Donovan pursuant to his informal, oral request. The memorandum was never intended to be, nor has it ever become, a formally published Opinion of the Attorney General.

ARGUMENT

I

The three-judge District Court convened pursuant to 28 U.S.C. §§ 2282 and 2284, lacked jurisdiction over the subject matter of the controversy under 28 U.S.C. § 1331; 28 U.S.C. § 1343(3); or 42 U.S.C. § 1983.

Although probable jurisdiction was noted by the one-judge court by invoking 28 U.S.C. §§ 1331 and 1343, it is obvious that the three-judge Court granted its temporary injunction on October 2, 1968, on the jurisdictional basis of 28 U.S.C. § 1331, alone. The court in its opinion discussed the Communist Control Act of 1954, the possible conflict of the Act with various provisions of the United States Constitution, and the impropriety of passing upon the constitutionality of the federal statute in the short length of time which was available to allow the court's mandate to become effective before the general election. The court therefore treated the controversy as one arising under the Constitution or laws of the United States. 28 U.S.C., § 1331. Lacking from the court's opinion is any discussion to the effect that the civil rights of appellants were being violated by the appellees acting under the color of state laws. Further, it is clear from the concurring

opinion of District Judge Neville that the court was acting only pursuant to 28 U.S.C., § 1331. At page 646 of 290 F. Supp., he states:

> "I would prefer to bottom jurisdiction on 42 U.S.C. § 1983 (Civil Rights Act) and 28 U.S.C. § 1343 rather than on 28 U.S.C. § 1331."

Subject matter jurisdiction is lacking, however, under 28 U.S.C. § 1331, as there is nothing in the complaint of appellants, either as originally filed or as amended, to indicate that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, as is required by that statute. Jurisdiction is to be, and must be, determined from the allegations of the complaint. *Mosher v. City of Phoenix*, 287 U.S. 29 (1932); *Levering and Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936).

The appellants throughout this proceeding have taken the position that in a voting rights case, the court may presume that the matter in controversy exceeds the sum or value of $10,000.00, and they cite: *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1902); and *Giles v. Harris*, 189 U.S. 475 (1903). The appellants then attempt to buttress their position by using *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953), *re'vd. per curiam, White et al. v. Howard et al.*, 347 U.S. 910 (1954); and *Hague v. C.I.O.*, 307 U.S. 496 (1939), (Concurring opinion of Mr. Justice Stone).

An examination of the case relied upon by appellants, and other recent cases, shows that the court does not and may not presume the requisite jurisdictional amount to be present in voting rights cases under 28 U.S.C. § 1331.

Both *Wiley v. Sinkler, supra,* and *Swafford v. Templeton, supra,* were voting rights cases. But the distinguishing element in both is that plaintiff in each case sued for damages, alleging the jurisdictional requisite under the predecessor of 28 U.S.C. § 1331. The plaintiff in each case alleged that he had been damaged to the stated amount by certain acts of defendant, who, it was claimed, wrongfully rejected his vote. In neither case did the court state that the jurisdictional amount may be presumed in a voting rights case.

The majority opinion in *Giles v. Harris, supra,* is somewhat more difficult to reconcile. That case involved a complaint in equity that defendant be required to enroll the name of plaintiff and others on certain voting lists. Plaintiff argued that jurisdiction be premised on the then Civil Rights Act. Plaintiff, however, did not allege damages and the Circuit Court on its own motion felt the bill was deficient in this respect. This court stated:

> "We have recognized too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money. (Citing *Wiley* and *Swafford.)* But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing."

189 U.S. 475, 485.

The court, therefore, decided to find jurisdiction present on the basis that no claim had been made below that it was not. The majority opinion prompted three dissents, Mr. Justice Harlan calling the jurisdictional conclusion "a new, and I take leave to say, a startling, doctrine." *Id.* 189 U.S. 475, 498.

Subsequent case law has all but ignored the majority's position in *Giles*.

In the briefs and arguments below, appellants placed strong emphasis upon the concurring opinion of Mr. Justice Stone in *Hague v. C.I.O., supra.* Plaintiffs in that case were various labor groups attempting to secure rights under the newly passed National Labor Relations Act. They were trying to enjoin municipal officers from enforcing ordinances which forbade the distribution of printed matter and the holding of public meetings without permits. Plaintiffs alleged that jurisdiction existed under both the Civil Rights Act and the predecessor of 28 U.S.C. § 1331. This Court held there was original jurisdiction only under the Civil Rights Act. In regard to the predecessor of 28 U.S.C. § 1331, the court stated that a mere allegation of damages was an insufficient basis upon which to predicate jurisdiction.

> "In suits brought under (the predecessor of 28 U.S.C., § 1331) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof of the plaintiff of facts justifying the conclusion that the suit involved the necessary sum. The record here is bare of any showing of the value of the asserted rights to the respondent individually . . . ."

307 U.S. 496, 507-508.

Mr. Justice Stone, concurring, felt that the final disposition of the case was correct, but felt that jurisdiction was also present under the predecessor of 28 U.S.C., § 1331. He stated:

> "There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money

> valuation, and in many instances, like the present, no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite."

307 U.S. 496, 529.

With respect to 28 U.S.C., § 1331, then, Mr. Justice Stone's concurrence in *Hague* is actually a dissent, and cannot be relied upon to the extent appellants have urged.

The fact that the requisite jurisdictional amount may not be presumed to exist under 28 U.S.C. § 1331, either in voting rights cases or any case involving social rights or personal liberties, can be seen from a number of cases decided subsequent to *Hague.*

In *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953), plaintiffs were officers and members of the "Republican Party of Mississippi" and defendants were the Secretary of State and others who were members and officers of the "Mississippi Republican Party." Plaintiffs sought to restrain defendants from enforcing a state statute that provided that no other political party could use or register a name already registered, which the defendants had done. Although there was some discussion about original jurisdiction under the Civil Rights Act, jurisdiction was premised solely on 28 U.S.C. § 1331. The District Court held that jurisdiction was present, stating that for jurisdictional purposes, the value of social and political rights is capable of pecuniary valuation. This Court, however, reversed per curiam, *White et al. v. Howard et al., supra,* and denied a rehearing. The complaint was ordered dismissed on jurisdictional grounds. From this series of events, it can be seen that if a deprivation of social and political rights is litigated, pursuant to 28 U.S.C. § 1331, plaintiff has the burden to both allege and prove the value of the deprivation in pecuniary terms.

Giancana v. Johnson, 335 F. 2d 366 (7th Cir. 1964), is similar. Plaintiff argued that personal rights and liberties cannot be given a price tag, and that the jurisdictional requisite may be presumed to exist in such a case. Plaintiff alleged various infringements of personal liberties growing out of a constant surveillance of himself and his home by FBI agents. In vacating the judgment of the District Court, the Circuit Court of Appeals held there was no original jurisdiction.

> "Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy. The showing of that essential is not a mere matter of form, but is a necessary element. Congress in § 1331 expressed the 'federal question' jurisdiction in plain words. The district courts and suitors are bound by the words expressed.
>
> * * *
>
> "Here the complaint makes no express allegation of the essential jurisdictional sum or value. . . . If, as plaintiff contends, the sum or value cannot be alleged because of the priceless rights involved, how can this court infer that essential element?
>
> * * *
>
> "Congress had a reason for setting the minimum jurisdictional sum or value in limiting the jurisdiction of the district court. (It surely knew of the priceless nature of liberty and privacy when it required a showing of that element.)"

335 F. 2d 366, 368-369.

This Court denied certiorari. 379 U.S. 1001 (1965).

In *Van Buskirk v. Wilkinson*, 216 F. 2d 735 (9th Cir. 1954), plaintiff, a federal prisoner, petitioned the district court for an injunction restraining defendant, warden of the penitentiary, from enforcing 18 U.S.C. § 4164, which provides for conditional release of prisoners, and for a judgment declaring that Act void for repugnance to the Constitution. The court dismissed the complaint due to lack of federal jurisdiction and suggested that plaintiff's remedy was a petition for a writ of habeas corpus.

> "Appellant's petition in the District Court does not contain any allegation whatsoever of any amount in controversy. The omission is fatal if the petition is to be taken for what it purports to be, namely, an application for injunction and declaratory relief in a civil action arising under the Constitution and laws of the United States."

216 F. 2d 735, 737.

Finally, there is *Boyd v. Clark*, 287 F. Supp. 561 (S.D. N.Y. 1968). In that case, also involving an application for an injunction and a declaratory judgment, plaintiffs challenged the constitutionality of the student deferment system under the Selective Service Act, on the grounds that the Act discriminated against persons economically unable to attend college. Plaintiffs argued jurisdiction was present under 28 U.S.C. § 1331. The court found a lack of jurisdiction, stating:

> "It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars."

287 F. Supp. at 564.

The above cases all were concerned with rights incapable of monetary valuation, and jurisdiction was found to be lacking in each. See, also, in this regard: *Kurtz v. Moffitt*, 115 U.S. 487 (1885); *First National Bank of Youngstown v. Hughes*, 106 U.S. 523 (1882); *Carroll v. Somervell*, 116 F. 2d 918 (2nd Cir. 1941); *Barry v. Mercein*, 46 U.S. (5 How.) 103 (1847); and 1 Moore, Federal Practice, § 0.92[5] (2nd ed. 1964).

Although it is clear that the three-judge court below premised its jurisdiction upon 28 U.S.C. § 1331, and that such jurisdiction is absent, there is also a lack of original jurisdiction under the Civil Rights Act.

28 U.S.C. § 1343 provides that:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . . (3) To redress the deprivation, *under color of any state law, statute, ordinary regulation, custom or usage*, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States: . . ." (Emphasis added.)

42 U.S.C. § 1983 provides:

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage of any State or Territory*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress." (Emphasis added.)

It is clear that jurisdiction under these statutes must be premised upon certain acts committed by a defendant *under the color of state law,* which acts deprived plaintiff of some right, privilege, or immunity secured by the Constitution or by an Act of Congress. Jurisdiction cannot exist in this case, however, because the acts of appellees were not done under the color of state law. The refusal to accept the petition was as a direct result of the dictates of a federal statute, the Communist Control Act of 1954, 50 U.S.C. §§ 841 and 842.

Nowhere in appellants' original or amended complaint is there an allegation that the alleged illegal acts of appellees were performed under the color of state law. In paragraph XVIII, of the complaint, after alleging that the petition met all the requirements of Minnesota law, appellants alleged that the refusal to accept the petition was based on an opinion by the Minnesota Attorney General. The memorandum of the Attorney General, however, was dictated by, and premised upon, the Communist Control Act. Appellee Head stated that Secretary of State Donovan should refuse to accept for filing the nominating petition *because of the provisions of 50 U.S.C. §§ 841 and 842.* The refusal was, therefore, not premised on any lack of compliance by the appellants with the Minnesota election laws nor was the refusal commanded by state law, but it was premised on the dictates of a federal statute. Appellants as much as admitted this point in paragraph XXIII of their complaint wherein they state:

"The illegal actions of the defendants as alleged herein are based upon the misconstruction and misapplication of the Communist Control Act of 1954 . . . ."

The distinction between acts done under color of state law and acts done under color of federal law was stated in *Norton v. McShane*, 332 F. 2d 855 (5th Cir. 1964). In that case, plaintiffs sued certain officials of the United States Department of Justice to recover damages for the deprivation of certain rights, growing out of their arrest during a civil rights disturbance. The court found no federal jurisdiction present under 42 U.S.C. § 1983.

> "The plaintiffs assert that they have alleged a cause of action under 42 U.S.C., § 1983, which is a federal civil rights statute imposing civil liability on any 'person, who, under color of any statute, ordinance, regulation, custom, or usage, *of any State or Territory*,' subjects anyone to the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' Thus, the person must be acting under color of *state* law for the section to apply, whereas the defendants in the instant suits were acting under color of *federal* law. As Judge Hand stated in the Gregoire case, 'Section 43 [the precursor of § 1983] is so plainly limited to acts done under color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading.' 177 F. 2d at 581."

332 F. 2d 855, 862. [Emphasis in original.]

Appellants in their briefs and arguments below placed much weight upon *Bomar v. Keyes*, 162 F. 2d 136 (2nd Cir. 1947), arguing that the case is authority for the proposition that the appellees, in the instant case, were acting under color of state law. In *Bomar*, plaintiff was a probationary teacher who sued her principal and other school officials to recover damages for deprivation of her rights. The facts showed she was discharged because of her absence from duty caused by her service on a federal jury.

The court stated jurisdiction was present under the Civil Rights Act.

> "That the plaintiff's discharge was 'under color' of a state statute scarcely needs discussion, and indeed follows from the very grounds given both by the Commissioner of Education and the judge in the state court. Both declared as their reason that, since under the New York Education Law, the plaintiff was only a 'probationary teacher,' her superiors were free to discharge her for any reason or no reason. From this it was thought to follow that, if they discharged her because she had served upon a federal jury, the discharge was lawful, regardless of the Civil Rights Act."

162 F. 2d 136, 139.

Thus, the deprivation of plaintiff's rights was plainly performed under color of state law.

Bomar does not support appellants' position because, in the instant case, the decision to reject the petition was required, not by any state statute or regulation, as there, but by a federal statute.

For the reasons stated above, there is no subject matter jurisdiction present, and the appeal should be dismissed.

II

The three-judge District Court was convened improperly pursuant to 28 U.S.C. §§ 2282 and 2284, as the relief requested did not require the restraining of the operation, enforcement or execution of an Act of Congress for repugnance to the Constitution of the United States.

28 U.S.C. § 2282 provides as follows:

> "An interlocutory or permanent injunction *restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States* shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added.)

Section 2284 of Title 28 sets forth the procedure for convening the three-judge court, notice to certain parties, and other procedural requirements. We must start with the proposition that 28 U.S.C. § 2282, and its counterpart in regard to the enforcement, operation, or execution of any state statute, 28 U.S.C. § 2281, are to be given a strict construction to protect the appellate docket of the Supreme Court. *Darlington, Inc. v. Federal Housing Administration*, 134 F. Supp. 337 (E.D. S.C. 1955), *rev'd. on other grounds*, 352 U.S. 977 (1957); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

With this rule of strict construction in mind, this Court has enunciated certain requirements that must be met in order for there to be a proper convening of a statutory three-judge court.

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the Constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

Idlewild Bon Voyage Liquor Corporation v. Epstein, 370 U.S. 713, 715 (1962).

With respect to the requirement that the complaint at least formally allege a basis for equitable relief, it is the position of appellees that 28 U.S.C. § 2282 requires the equitable relief to be framed as a prohibitory injunction which itself *restrains* ". . . the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States. . . ." 28 U.S.C. § 2282.

Plaintiffs' prayer for relief contains no such request for a prohibitory injunction, but instead requests only a mandatory injunction requiring appellee Donovan to: 1) accept and file the petition for nomination; and 2) place upon the ballot for the November 5, 1968 general election the names of Mitchell and Zagarell as candidates of the Communist Party. The amended complaint likewise contains no request for an injunction which in any way requires restraining the enforcement, execution, or operation of any Act of Congress, specifically 50 U.S.C. §§ 841 and 842.

Illustrative of Congress' intention that § 2282 must pertain only to prohibitory injunctions that interdict the operation, execution or enforcement of a federal statute is *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Mendoza-Martinez was ordered deported as an alien because he lost his citizen-

ship by remaining outside the United States in time of war or national emergency, for the purpose of avoiding military service. He sued for a declaratory judgment, asking that various sections of the Immigration and Nationality Act be declared unconstitutional, and that the orders of deportation be declared void. A one-judge District Court held Section 401(j) of the Nationality Act of 1940 to be unconstitutional. On appeal, one issue was whether a three-judge Court should have been convened to hear the case, pursuant to 28 U.S.C., § 2282. This Court was satisfied, however, that the case was properly heard by a one-judge District Court, because no injunctive relief was requested by plaintiff, and the regulatory scheme of the Nationality Act was not interdicted in any fashion. In so doing, the Court stated that § 2282 and its complement, § 2281, "were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order." 372 U.S. 144, 154.

The Court looked to the legislative history of § 2282 to determine its purpose:

> "Repeatedly emphasized during the congressional debates on §2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire regulatory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction. 81 Cong. Rec. 479-481, 2142-2143 (1937)"

372 U.S. 144, 155.

The mere declaration of unconstitutionality, without any request for a prohibitory injunction, does not trigger the convening of a three-judge court.

> "The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained."

Id.

In the instant case, the District Court purposefully did not reach the merits of the case, and did not decide whether the Communist Control Act of 1954 was constitutional or unconstitutional. More important, there was no prayer for relief that would in any way interdict the operation of the federal statute. The prayer for relief demanded only a mandatory injunction that the Secretary of State accept the nominating petition and place appellants' names on the general election ballot. The actions of appellees in rejecting the petition were performed in reliance upon the federal Act, and the granting of the temporary injunction affected the Communist Control Act in a totally noncoercive fashion. There was no "applica-

tion for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress." *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Company*, 382 U.S. 281, 282 (1965).

That § 2282 requires not only an application for a prohibitory injunction, but also a prohibitory injunction which directly interrupts the operation of a federal statute, can be seen from *International Ladies' Garment Workers' Union et al. v. Donnelly Garment Co. et al.*, 304 U.S. 243 (1938). That case involved an application for an injunction to restrain union members from committing certain acts alleged to be in furtherance of a conspiracy in violation of the Sherman and Clayton Acts. The case was heard and decided by a three-judge District Court, but this Court held the three-judge court was improperly convened, and remanded the cause. This Court stated that there was no application before the district court for an injunction which in any way restrained the enforcement of an Act of Congress.

> "The only application for an injunction was one to restrain the defendants from committing certain acts in pursuance of the alleged conspiracy in violation of the Anti-Trust Acts. The statute did not authorize a decision by three judges upon that application or authorize a direct appeal to this Court."

304 U.S. 243, 251.

Thus, the application was for a prohibitory injunction, but the injunction in no way had a direct, coercive influence upon the federal statutes involved.

A case very similar to the instant proceeding is *Fleming v. Nestor*, 363 U.S. 603 (1960). There, plaintiff challenged the constitutionality of § 202(n) of the Social Security Act, which

provided for the termination of old-age benefits payable to an alien deported pursuant to § 241(a) of the Immigration and Naturalization Act. The case was heard before a one-judge District Court, and an issue on appeal was whether a three-judge court should have been convened. This Court held that the one-judge court was proper.

> "Under the decisions of this court, this § 205(g) action could, and did, draw in question the constitutionality of § 202(n). . . . However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of stare decisis, it would have no other result than to require the payment of appellee's benefits. . . ."

363 U.S. 603, 607.

In the instant case, plaintiff did not seek affirmatively to interdict the federal statute. An injunction in favor of plaintiff, either permanent or in the temporary form in which it was granted, could not put the federal statute under the restraint of an equity decree. The temporary order only had the effect of requiring the names to be placed upon the ballot, analagous to the *Fleming* case, where the only result would have been to require the payment of old-age benefits.

It should be noted that once the election of November 5, 1968 transpired, appellants' amended complaint became decisive, but such did not ask for *any* form of injunctive relief. Appellants were then simply asking the court to reach the merits of the declaratory judgment phase of the lawsuit, by claiming there was yet an existing controversy. The action then became only a declaratory judgment action and any

jurisdiction that *might* have existed previously based on § 2282, was vitiated by the lack of any continued request for injunctive relief. A declaratory judgment action alone is insufficient to warrant a hearing by a three-judge court. *International Ladies' Garment Workers' Union v. Donnelly Garment Co. et al., supra*; *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co., supra.*

Thus, the three-judge District Court was improperly convened in the first instance, pursuant to 28 U.S.C., § 2282 and § 2284. If properly convened in the first instance, the jurisdiction of the three-judge court was vitiated by the lack of any request for injunctive relief subsequent to the general election; and, as a consequence, the appeal must be dismissed.

III

A direct appeal to this Court pursuant to 28 U.S.C. § 1253 is impermissible, as the order dismissing the complaint could and did refer only to the prayer for a declaratory judgment, the prayer for injunctive relief having been rendered moot by the general election.

Section 1253 of Title 28 U.S. Code provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The appeal in this case has been taken from the order of the three-judge Court which dismissed appellants' complaint as

moot on July 14, 1969, *Mitchell v. Donovan*, 300 F. Supp. 1145 (D. Minn. 1969).

Such an order is *not* appealable because: 1) the action was not one "required by any Act of Congress to be heard and determined by a district court of three judges," as discussed above, and 2) the order was not one which granted or denied an interlocutory or permanent injunction.

As previously mentioned, the injunctive relief requested in the complaint pertained only to the general election held Novmber 5, 1968. This relief was granted in the order of the three-judge court dated October 2, 1968, *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn.), and defendant in all respects complied with that order, *Mitchell v. Donovan*, 300 F. Supp. 1145, 1146. After the general election, plaintiffs were allowed to amend their complaint by alleging that the Communist Party of Minnesota plans to participate in future elections, and that "on information and belief," Attorney General Douglas M. Head will render the same opinion in the future, namely, that the Communist Control Act of 1954 bars the Communist Party of Minnesota or any of their candidates from participating in any elections in the State of Minnesota. 300 F. Supp. 1145, 1146-1147.

The prayer for relief was not amended in any way, and therefore, there was no request for an interlocutory or permanent injunction pending before the court. The only remaining prayer for relief was that the Communist Control Act of 1954 be declared unconstitutional. The District Court explicitly stated in the first sentence of its opinion:

> "We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . ."

300 F. Supp. 1145, 1146.

The Court then decided that the issues presented were moot and rendered its order dismissing the complaint. This appeal, therefore, is not from an order granting or denying an interlocutory or permanent injunction, as § 1253 requires; because the injunctive relief sought pertained only to the November 5th election. Once the election was held, the sole relief possibly remaining was the granting of a declaratory judgment. The order of dismissal, therefore, could not and did not pertain to the request for injunctive relief, but only to the request for a declaratory judgment. The order is, therefore, not appealable because it did not grant or deny an interlocutory or permanent injunction. 28 U.S.C. § 1253.

The cases cited by appellants to sustain the jurisdiction of this Court to review the judgment on direct appeal pursuant to 28 U.S.C. § 1253, are not applicable. In both *Clark v. Poor*, 274 U.S. 554 (1927), and *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), plaintiffs requested injunctive relief in their complaints, the complaints were dismissed and the appeals taken from the orders of dismissal. In the instant case, the only prayer for relief presented to the District Court on July 14, 1969, was for a declaration that the Communist Control Act was unconstitutional. There was no dismissal of a request for injunctive relief, because the injunctive relief prayed for only pertained to the election of November 5, 1968, and that relief had already been granted.

For the above stated reasons, the Supreme Court lacks jurisdiction over the Appeal, and therefore the same must be dismissed.

IV

The three-judge District Court, if it possessed the requisite jurisdiction, properly dismissed the prayer for declaratory relief on the ground that the questions presented were moot and therefore did not present an actual justiciable controversy.

Assuming for the sake of argument that the three-judge District Court had subject matter jurisdiction and was convened for a proper purpose, it was justified in dismissing the prayer for declaratory relief on the ground that the questions presented were moot and therefore did not present an actual justiciable controversy.

The judgment from which the instant appeal arises denied declaratory relief to appellants, claimed to be justified by the constitutional repugnance of 50 U.S.C. §§ 841 and 842, and determined that:

> "There is no 'actual controversy' as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act."

Mitchell v. Donovan, 300 F. Supp. 1145, 1150 (D. Minn. 1969).

All that the Court concerned itself with was "that portion of plaintiffs' complaint seeking declaratory relief. . . .", *Id.* at 1146. As is required by U.S. Const. art. 3, § 2, and the express language of the Declaratory Judgment Act, 28 U.S.C. § 2201, it became a precondition of granting relief that an actual controversy exist,

> "In a case of actual controversy within its jurisdiction, . . . any court of the United States, . . . may declare

> the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

Declaratory Judgment Act, 28 U.S.C. § 2201.

"Actual controversy" has been defined variously, and it contemplates a real, as opposed to hypothetical, dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant determination by the Courts. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958). The constitutional standard for the basis of federal jurisdiction that there be an actual "case or controversy" is not in any way affected by having the Declaratory Judgment Act extant. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). In fact, as the court below recognized, the

> ". . . Constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,
>
> '[t]he Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.' Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111. . . . (1962)."

Mitchell v. Donovan, 300 F. Supp. 1145, 1147.

The key word in the phrase is "actual" (controversy). Below, the temporary injunction issued October 2, 1968 sufficed to give appellants all of the relief they possibly could

have achieved with respect to the November 1968 general election. Appellees complied fully with the Court's mandate. By a petition filed on October 10, 1968, to amend their complaint, which was granted on July 14, 1969, appellants alleged that they intended to participate in future local, state and national elections to be held in Minnesota subsequent to November 5, 1968, and that on "information and belief" the appellee Attorney General will continue to hold that 50 U.S.C. §§ 841 and 842 bars appellants from participating in such elections. The claimed intention to run candidates under the designation "Communist Party" in Minnesota elections on unspecified future dates, and the "information and belief" as to what appellee Head will advise Minnesota election officials to do were sufficient, in appellants' opinion, to create the required actual controversy between appellees and them. The court below quite properly found that the controversy was at best hypothetical. 300 F. Supp. 1145, 1150.

The official Opinions of the Attorney General of Minnesota do not have the force and effect of law (except for opinions issued on school matters to the State Commissioner of Education, which are decisive on the issues raised until otherwise determined by a court of competent jurisdiction). Minn. Stat. 1967, Secs. 8.02 and 8.07. Minnesota has no statute remotely comparable to the Communist Control Act, nor do its election laws in any way attempt to dictate the policies of the parties which seek to run candidates on the state ballot. The method under which a minority party is placed on the state ballot by petition is not arduous, Minn. Stat. 1967, Secs. 202.09 and 202.10, and there can be no valid claim that the state's election laws make it "virtually impossible for a new political party, . . . or an old party . . . to be placed on the state ballots . . .", *Williams et al. v. Rhodes et al.*, —— U.S. ——,

89 S. Ct. 5 (1968), or, put another way, that the state's election laws with respect to placing appellants on future ballots violate the Due Process and Equal Protection clauses of the 14th Amendment. *Moore v. Ogilvie*, —— U.S. ——, 89 S. Ct. 1493 (1969). In short, there is nothing to indicate a firmly imbedded state policy by statute or otherwise which would lead to the probable certainty that this "controversy" will ever be joined again. 300 F. Supp. 1145, 1149.

A number of other factors point out the gossamer nature of the "controversy". Initially, it must be noted that the communication between appellees Head and Donovan on September 9, 1968, which led to Donovan's refusal to accept appellants' nominating petition was not a formal Opinion of the Attorney General as such is contemplated by Minn. Stat. 1967, Sec. 8.02. It was nothing more than a memorandum issued with the knowledge that this litigation might ensue, and issued without the benefit of any federal court or United States Supreme Court decisions as to the constitutionality of 50 U.S.C. §§ 841 and 842, or that statute's applicability to state elections. Now, as a result of the litigation, the position of the United States Attorney has been enunciated, and there have been two federal court opinions which shed light on both the applicability and constitutionality of the federal statute. Such might lead the present or some future Attorney General to alter his position.

Secondly, even if it were to be presumed or determined that appellee Head's September 9th memorandum to appellee Donovan rises to the status of a section 8.02 Opinion, nothing in fact or in state law would prevent the withdrawal or overruling of it either with or without a subsequent formal Opinion. In view of the fact that the appellees complied in all respects with the October 2, 1968 mandate of the three-

judge District Court to accept appellants' nominating petition and to place the names of appellants Mitchell and Zagarell on the ballot, while at the same time making a public announcement that the temporary injunction would not be contested by appellate proceedings, one is not bolstered in an "information or belief" that appellee Head's determinations will remain constant.

Further, it appears that appellee Donovan was not legally bound to adhere to the advice contained in the September 9th memorandum, although, of course, he did choose to do so; nor does it appear that appellee Head considered that he was closing all of appellee Donovan's options. The final paragraph of the memorandum reads:

> "In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

The last-quoted sentence is unnecessary if one takes the position that Head's "opinion" on the subject is totally final and binding. By including the sentence, the option for Donovan to act upon any doubts he might have as to the effect on his authority posed by 50 U.S.C. §§ 841 and 842, and accept the nominating petition is left open. In 1968, Secretary Donovan chose to follow the Attorney General's advice but he joined with Head in choosing not to appeal the October 2nd mandate. Should an opinion be requested at some future date, which is not at all certain, and should the same advice be forthcoming from the Attorney General, the Secretary might just as well as not accept for filing a Communist Party nominating petition.

Tacitly present in appellants' complaint, as amended, is the assumption that Douglas M. Head and Joseph L. Donovan will occupy their present official positions at the time of all elections in the foreseeable future. The assumption is, of course, fallacious; and made particularly so by the facts that Secretary Donovan has announced publicly that he will not stand for reelection and that Attorney General Head is presently a candidate for a different elective office. The court below did not and could not attempt to determine what the positions of the unknown successors to Donovan and Head will be on any issue, and least of all on the emotionally volatile effect of 50 U.S.C. §§ 841 and 842 on Minnesota substantive and procedural election laws.

Appellants' amended complaint alleges that the Communist Party will enter candidates under its banner in future Minnesota national, state and local elections. On November 3, 1969, there were held numerous contests throughout the state to elect persons to serve as mayors, councilmen, and members of various other representative bodies. At no such election did the Communist Party attempt to field a candidate. It is probably fair to assume that shortly prior to the presidential election to be held in November, 1972 will be the first opportunity for the "controversy" to become "actual" in Minnesota. As such, the court was fully justified in July, 1969 in holding that such an embryonic "controversy", which probably would not ripen until 1972 if at all, was not such as to require a determination. *Fair v. Dekle*, 367 F. 2d 377 (5th Cir. 1966), *cert. denied* 386 U.S. 996 (1967)

Of course the 1968 election was history at the time of the court's judgment in July, 1969. Appellants had received the injunctive relief they requested and an attempt to make the October 2nd temporary injunction permanent became moot by

virtue of the fact that appellees complied with the temporary injunction in all respects. This mootness, coupled with the factors listed above, deprived the court below of an actual case or controversy upon which to grant declaratory relief. U.S. Const. Art. 3, § 2; 28 U.S.C. § 2201.

For the reasons stated the judgment of the three-judge District Court, dismissing the within action on the grounds of mootness and lack of an actual controversy, must be affirmed.

V

As the three-judge District Court did not pass upon the claimed constitutional repugnance of 50 U.S.C. §§ 841 and 842, for this Court to do so would require an impermissible advisory opinion.

Appellants have raised a number of constitutional challenges to 50 U.S.C. §§ 841 and 842, but at this time none are ripe for a decision, as the three-judge District Court specifically refused to pass upon them, and because no actual controversy exists between appellants and appellees. Federal Courts established pursuant to U.S. Const. art. 3, are not permitted to render advisory opinions on constitutional issues. For there to be adjudications of constitutional issues there must be concrete legal problems presented in actual cases to be decided, not mere abstractions. This requirement, is of course, as valid a prerequisite for the entry of a declaratory judgment as it is in any other field. U.S. Const. art. 3, § 2; 28 U.S.C. § 2201; *Golden v. Zwickler*, 394 U.S. 103 (1969); *United Public Workers of America, C.I.O. v. Mitchell*, 330 U.S. 75 (1947).

The duty of this Court is to decide actual controversies by judgment, which are capable of being carried into immediate

effect, and not to give opinions upon moot quesions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it. This duty is constitutional in scope and renders this Court unable to deliver advisory opinions. U.S. Const. art. 3, § 2; *Bell v. Maryland*, 378 U.S. 226 (1964); *United States v. Fruehauf*, 365 U.S. 146 (1961); *Oil, Chemical and Atomic Workers International Union, A.F.L.-C.I.O. v. Missouri*, 361 U.S. 363 (1960).

It is apparent that it is most probable that the "controversy" concerning the placement of Communist Party candidates on the Minnesota ballot will never again arise, and certainly will not arise in the definitely foreseeable future. The named appellees will probably not be in their respective offices when Communist Party candidates' petitions are next presented; and, if they are, they will undoubtedly recall the temporary injunction issued in October of 1968, and consider the adamant refusal to accept the same to be futile, irrespective of Solicitor Kyle's remarks. The Party may not advance candidates for office in Minnesota elections ever again despite Mrs. Smith's affidavit. (The Party ran no candidates in Minnesota at all from 1949 to 1968; and the results with respect to the 1968 general election were so abysmally pathetic that it is possible the Party will choose to exert its future political efforts before a more receptive electorate.) Also, there is the distinct possibility that this Court will have occasion, in a more appropriate context, to rule as to the constitutional validity of 50 U.S.C. §§ 841 and 842, before appellants again attempt to get on the Minnesota ballot. Should such a determination be made, no controversy with respect to the state election process would be possible between the present parties. In this context then, it would be inappropriate for this Court to issue an advisory opinion—as such is all a decision on the

constitutional validity of §§ 841 and 842 could be with respect to the parties herein—predicated upon issues which are now moot and which never again may arise. *Baker v. Carr*, 269 U.S. 186 (1962); *Oliver v. United States*, 335 F. 2d 724 (D.C. Cir. 1964), *cert. denied, Crump v. United States*, 379 U.S. 980 (1965); *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Emp. of America, Division 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 416 (1951); see, also, *Taylor v. United States*, 410 F. 2d 392 (5th Cir. 1969); *Koll v. Wayzata State Bank*, 397 F. 2d 124 (8th Cir. 1968); *Wolff v. Selective Service Board*, 372 F. 2d 817 (2nd Cir. 1967); *Wirtz v. Local Unions 410, et al.*, 366 F. 2d 438 (2nd Cir. 1966); and *Shaffer v. Bridges*, 295 F. Supp. 869 (S.D. Miss. 1969); and, see, *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953).

When the District Court did not pass upon the asserted claims of unconstitutionality of the Communist Control Act of 1954, 50 U.S.C. § 841 and § 842, any determination of those claims on appeal would constitute an impermissible advisory opinion.

It is clear from both three-judge District Court opinions that the seriousness of appellants' asserted claims of unconstitutionality was recognized. While the gravity of those claims was acknowledged, the Court in its first opinion determined that there was insufficient time to deal with the issues on the merits, and merely balanced the equities in deciding that a temporary mandatory injunction should issue. In its later opinion, the Court again did not reach the constitutional issues, because of its threshold decision that a justiciable case of controversy was no longer present.

Thus, the District Court has not decided the merits of appellants' constitutional claims, and has in fact not even considered those claims beyond the point of noting their

gravity. Although the briefs below dealt with the substantive issues, almost all of the time spent at all oral arguments was given over to the jurisdictional issues and appellees' claim of a lack of a justiciable case or controversy. Thus, the substantive issues were neither decided nor fully argued below. For this Court now to decide these issues on appeal would require the rendition of an unconstitutional advisory opinion. What was enunciated concerning advisory opinions in *United States v. Fruehauf*, 365 U.S. 146 (1961) is likewise applicable here:

> "Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of advisory argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give."

365 U.S. 146, 157. [Citations omitted.]

That such a disposition would constitute an advisory opinion can be seen from *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). That was an action against members of the civil service commission to enjoin them from enforcing the Hatch Act. Plaintiffs, however, did not allege that they had violated the Act, or that they were threatened with any disciplinary action, but only that they desired to engage in political campaigns, and could not do so for fear of dismissal. The District Court granted summary judgment *for* the defendants, and on appeal the Court held there was no justiciable case or controversy present.

> "A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statement, or the circumstances of their publication. It would not accord with judicial responsibility to adjudge in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

330 U.S. 75, 90.

Another example of this judicial attitude can be gleaned from *Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964), an action under the Civil Rights Act arising out of threats by the authorities to prosecute exhibitors of certain obscene films. The complaint was dismissed for failure to state a claim. The Circuit Court reversed, holding the complaint to state a cause of action, but further holding that they could not render an advisory opinion.

> "It would be inappropriate to attempt finally to determine whether appellants would be entitled to relief upon a supposed state of facts encompassed within the broad boundaries of their pleading. To do so . . . would involve 'elucidating legal responsibilities as to facts which may never be'. Shull v. Pilot Life Ins. Co., 313 F. 2d 445, 447 (5th Cir. 1963). An advisory opinion as to a necessarily hypothetical case is particularly undesirable where, as here, principles are in a formative and uncertain state."

338 F. 2d 441, 443.

As no relief, other than that already obtained by appellants, could be forthcoming if this Court were to determine the constitutional issues presented, and as no actual controversy exists between the parties, the judgment of the three-judge District Court must be affirmed.

CONCLUSION

For the reasons set forth, the appellees respectfully request that their "Motion to Dismiss the Appeal or, In the Alternative, to Affirm the Judgment Entered Below" be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY TO MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

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REPLY TO MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

The appellees, in their Motion to Dismiss Appeal or, in the Alternative, to Affirm the Judgment Entered Below, do not contest the appellants' contentions that this case presents substantial federal questions. Appellants discussed this in the Jurisdictional Statement, pages 17-24, and are supported by the three-judge court opinions of October 2, 1968, and July 14, 1969. The appellants are further supported in their contention that this case presents substantial federal questions by the posture of the United States Attorney in his *amicus curiae* brief to the three-judge court

and by Mr. Justice Harlan in *Communist Party U.S.A. v. Catherwood*, 367 U.S. 389 (1961). Therefore, the appellants will not discuss this further in their reply.

Appellees' questions 3, 4 and 5 discuss whether the case is moot and whether there is an actual controversy. Appellants fully discuss these questions in their Jurisdictional Statement, pages 12-17, and will not repeat their discussions of these questions in their reply.

Appellees, in their motion, discuss in questions 1 and 2, whether the three-judge district court properly found jurisdiction of the subject matter, and whether the three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282. Appellants and appellees fully briefed and argued these questions before a single judge court and twice subsequently before a three-judge court. In view of the fact that these questions were not discussed at length in the Jurisdictional Statement, this brief reply will amplify that discussion.

The specific questions discussed below are:

(1) Whether the three-judge district court properly found jurisdiction of the subject matter; and

(2) Whether a three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282.

(1) *Whether the three-judge district court properly found jurisdiction of the subject matter.*

Appellees, in their motion, incorrectly assess the findings of the three-judge district court in regard to jurisdiction.

Appellees, in their motion, state, "The three-judge District Court, convened pursuant to 28 U.S.C. §§2282 and

2284, to determine the issues below, based its jurisdiction over the subject matter upon 28 U.S.C. §1331." (p. 2). Further, appellees assert, "Although probable jurisdiction was noted by the one-judge court by invoking 28 U.S.C. §§1331 and 1343, it is obvious that the three-judge court granted its temporary injunction on October 2, 1968, on the jurisdictional basis of 28 U.S.C. §1331, alone." (p. 13); and again appellees state, "Although it is clear that the three-judge court below premised its jurisdiction upon 28 U.S.C. §1331, and that such jurisdiction is absent, there is also a lack of original jurisdiction under the Civil Rights Act."

Appellees argue the three-judge court premised its jurisdiction alone on 28 U.S.C. 1331, and devote much argument to the contention that the requisite $10,000 is not shown.

It is clear that the three judges of the three-judge district court unanimously based jurisdiction on the Federal Civil Rights Act, 42 U.S.C. 1983, 28 U.S.C. 1343.

Following extensive briefs and arguments, the three-judge court in its opinion filed October 2, 1968, found:

> "While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U.S.C.A. §§1331, *1343*, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U.S.C.A. §§2282; 2284. *Flast* v. *Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968)." (Three-judge court opinion October 2, 1968, Jurisdictional Statement Appendix, p. 27). (Italics supplied.)

This finding of jurisdiction based upon 28 U.S.C.A. 1331 and the *Federal Civil Rights Act, 28 U.S.C.A. 1343* was made by Chief District Judge Devitt and Circuit Judge Blackmun.

In a concurring opinion, District Judge Neville based jurisdiction of the subject matter solely on the Federal Civil Rights Act, 28 U.S.C.A. 1343.

> "I would prefer to bottom jurisdiction on 42 U.S.C. §1983 (Civil Rights Act) and 28 U.S.C. §1343 rather than on 28 U.S.C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted 'under color of [a] statute' of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition did not apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much 'action under color of law' as is the reverse. Also I agree that a three-judge court is proper." (Concurring opinion of the three-judge court October 2, 1968, Jurisdictional Statement Appendix, pp. 34 and 35.)

It is clear from the opinions rendered October 2, 1968, that the three judges unanimously agreed that there was original jurisdiction of the subject matter under the Federal Civil Rights Act, 28 U.S.C.A. 1343. Also, all three judges unanimously found the convening of a three-judge district court under 28 U.S.C.A. 2282 proper.

In the following months appellees and appellants submitted further briefs on the appellants' motion to amend the complaint, which was granted, and the appellees' motion to dismiss, which was granted. Following careful consideration over a 9-month period, the three-judge district court issued an opinion which again unanimously recognized jurisdiction based upon the Federal Civil Rights Act, 28 U.S.C.A. 1343:

> "In response to the original complaint, probable jurisdiction was noted, *28 U.S.C.A. §1343,* and a statutory three-judge court was convened, 28 U.S.C.A. §2282, 2284, to consider further the issues raised by the pleadings." (Opinion of the three-judge court July 14, 1969, Jurisdictional Statement Appendix, p. 39.) (Italics supplied.)

Under the Federal Civil Rights Act it is not required to show an amount in controversy. The appellees do not contest the appellants' assertion that the right to vote is a privilege secured by the United States Constitution, or that the Federal courts have original jurisdiction to protect that right under the Federal Civil Rights Act. See *Baker* v. *Carr,* 369 U.S. 186 (1962); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Davis, Assessor-Collector of Taxes, Bexas County, Texas, et al.* v. *Mabry, et al.,* 380 U.S. 251 (1965); *Harman* v. *Forssenius,* 380 U.S. 528, affirming *Forssenius* v. *Harman,* 235 F. Supp. 66 (1964); *Ray* v. *Blair,* 343 U.S. 214 (1952); *Reynolds* v. *Sims,* 377 U.S. 533 (1963); *Swafford* v. *Templeton,* 185 U.S. 487 (1902); *United States* v. *Classic,* 313 U.S. 299 (1941); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900).

Original jurisdiction has been found under the Federal Civil Rights Act in a number of cases following the No-

vember 5, 1968, general election, and are discussed in the appellants' Jurisdictional Statement.

Appellees contend, however, that they did not act under color of state law because the appellee Attorney General based his opinion that the the appellant candidates were barred from the ballot on his interpretation of an Act of Congress, the Communist Control Act of 1954, 50 U.S.C.A. 841, 842. The three judges of the three-judge court unanimously, in both opinions, rejected this contention by basing jurisdiction on the Federal Civil Rights Act. In the second opinion of the three-judge court, July 14, 1969, the sole jurisdictional citation was 28 U.S.C.A. 1343, and the court made no comment that jurisdiction might be questionable.

Appellees cite *Norton* v. *McShane*, 332 F.2d 855, 862 (1964) to support their contention that the appellee Attorney General was acting under color of federal law and not state law. The case does not support their contention. In that case the suit was brought against federal officials who derived their authority from federal law. In this case the appellees are state officials acting under authority of state law. The appellee Attorney General rendered a legal opinion pursuant to a Minnesota State Statute, M.S.A. 8.02, and appellee Secretary of State Donovan derived his authority in regard to the acceptance of nominating petitions under Minnesota State Statutes 202.09, et seq.

To determine whether an official is acting under color of state law, the relevant laws are those of the state and local government—charters, statutes and ordinances—which clothe the officials with the authority of their offices. Congress could not have intended that state officials could exempt themselves from the provisions of the Federal Civil Rights Act by allowing them to assert that they believed

the United States Constitution or Acts of Congress allowed them to so act.

If the appellees' contention is accepted, then any state official could freely censor literature or speech with the bland assertion that the literature or speech was outside of the protections of the First Amendment.

This distinction is found in *Harman* v. *Forssenius, supra.* The Supreme Court sustained Federal Civil Rights Act jurisdiction and the convening of a three-judge court where state officials relied upon their interpretation of the Twenty-Fourth Amendment to the United States Constitution and implemented a state scheme requiring payment of a poll tax.

Bomar v. *Keyes,* 162 F.2d 136 (2d Cir. 1947) supports the appellants' contention that appellees Head and Donovan were acting under the color of state law. The state officials in *Bomar* were governed by the New York Education Law just as appellee Head's authority to issue opinions is governed by Minnesota Statute 8.02 and appellee Donovan's authority to accept nominating petitions is governed by Minnesota Statutes 202.09, et seq. In *Bomar* the state officials interpreted the Federal Judicial Code to support their refusal to excuse a teacher's absence from her job to do jury service, just as appellees Head and Donovan interpreted the Communist Control Act of 1954 to justify their actions.

Appellants urge the court to note probable jurisdiction on the basis of the Federal Civil Rights Act, 28 U.S.C.A. 1343, because the appellees were acting under color of state law in denying the appellant candidates a place on the ballot.

Appellants also contend there is original jurisdiction of the subject matter under 28 U.S.C.A. 1331. Appellees have consistently conceded that there are substantial federal questions raised in the challenge to the constitutionality of 50 U.S.C.A. 841, 842. However, they take the position that the requisite $10,000 has not been proven.

Appellants have urged that a court may presume that the matter in controversy exceeds the sum or value of $10,000 in a voting rights case. Appellants properly pleaded the jurisdictional amount. In *Wiley* v. *Sinkler,* 179 U.S. 58 (1900), a voting rights case, the Court ruled that the lower court inappropriately held that the amount in controversy was insufficient to support the jurisdiction of the court. Also, in *Swafford* v. *Templeton,* 185 U.S. 487 (1902), the Court likewise held that the wrongful refusal of state election officials to permit the plaintiff to vote for a member of Congress at a national election violated constitutionally protected rights, and did not require a showing of facts to support an actual monetary loss. The fact that these cases were brought in the form of actions for damages is irrelevant. They stand for the proposition that a man's right to vote may be alleged to involve damage capable of estimation in money, and that jurisdiction is properly conferred upon that allegation.

In *Giles* v. *Harris,* 189 U.S. 475 (1902), the Court held that the predecessor of 28 U.S.C.A. 1331 conferred original jurisdiction on the federal court in an *equity* action in a voting rights case, citing *Wiley* and *Swafford,* and *Mills* v. *Green,* 159 U.S. 651 (1895).

In *Howard* v. *Ladner,* 116 F. Supp. 783 (S.D. Miss. 1953), jurisdiction was premised solely on 28 U.S.C.A. 1331. Although there was the possibility of Federal Civil Rights

Act jurisdiction in the case, an examination of the briefs and record indicates that jurisdiction under the Civil Rights Act was omitted by error of counsel. Moreover, the dismissal of the case on jurisdictional grounds was over the strong dissents of Mr. Justice Black, Mr. Justice Reed and Mr. Justice Douglas who would have postponed the jurisdictional questions to a hearing on the merits. Appellants believe a study of the briefs and record indicates that the dismissal was for want of a substantial federal question "arising from" the Constitution, and not from want of jurisdictional amount under 28 U.S.C.A. 1331.

However, even if this Court required a specific showing of a monetary loss of $10,000 in this case, the appellants have not had the opportunity to show it. See *Oestereich v. Selective Service Sys. L. Bd. No. 11, Cheyenne, Wyo.*, 89 S. Ct. 414, 417 (1968). The case has not been heard in trial upon appellants' notice of trial, but was finally disposed of on a motion to dismiss as moot.

(2) *Whether a three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282.*

The three-judge district court, in its two opinions of October 2, 1968, and July 14, 1969, unanimously found that a three-judge district court was properly convened.

Appellants urge the Court to find that the three-judge court properly held there was basis for convening a three-judge court. The relief requested prior to the election was sufficient to confer jurisdiction on a three-judge court. The complaint asked for an injunction to require the appellees to place the appellant candidates on the ballot. This was coupled with a request for a declaration that 50 U.S.C.A.

841 and 842 are unconstitutional. If granted, this relief certainly would restrain the enforcement, operation or execution of the Act.

However, under the facts of the present case, even if an injunction were not requested prior to the November 5 election, a three-judge court is warranted. In *U. S.* v. *149 Gift Packages,* 52 F. Supp. 993 (E.D.N.Y., 1943), the court considered a case of libel against 149 gift packages alleged to have been misbranded. The answer did not deny misbranding but alleged a counterclaim which attacked the statute as unconstitutional. The counterclaim by its terms did not ask for an injunction. Yet the court ruled that the relief requested had the effect of restraining the enforcement of the statute and ruled a three-judge court necessary. See also *Rolls-Royce* v. *Stimson,* 56 F. Supp. 22 (D.D.C. 1944).

In the present case, the granting of the temporary injunction by the three-judge court, if it were coupled with a declaration that 50 U.S.C.A. 841 and 842 are unconstitutional, would effectively restrain the enforcement, operation or execution of the Act by either state or federal officials. This is not a case where the Act has often been before the courts, which would make claims of constitutionality frivolous, and a three-judge court unnecessary. See *Acret* v. *Harwood,* 41 F. Supp. 492 (S.D. Cal. 1941) and *Bailey* v. *Patterson,* 369 U.S. 41 (1962).

Moreover, if the granting of injunctive relief is inappropriate after the election, jurisdiction of a three-judge court does not evaporate. In *Zwickler* v. *Koota,* 389 U.S. 245 (1967), this Court accepted a direct appeal from a three-judge court to consider a claim for declaratory relief that a state penal statute was unconstitutional, even though there

were no special circumstances which would allow the court to issue injunctive relief. Also, in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), this Court heard a declaratory judgment suit direct appeal from a three-judge court.

CONCLUSION

Appellants urge that the three-judge court's holding that there is original jurisdiction under the Federal Civil Rights Act, 28 U.S.C.A. 1343 and that a three-judge court was properly convened pursuant to 28 U.S.C.A. 2282 be affirmed by this Court by noting probable jurisdiction. If this Court believes there is some question as to jurisdiction, the appellants urge the Court hear the merits and postpone the question of jurisdiction to a hearing on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, COMMUNIST PARTY, USA,
COMMUNIST PARTY OF MINNESOTA, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State
of the State of Minnesota, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANTS

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IN THE

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OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, COMMUNIST PARTY, USA, COMMUNIST PARTY OF MINNESOTA, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANTS

Opinions Below

The initial opinion, dated October 2, 1968, which granted a requested order requiring appellee, Joseph L. Donovan, to place the names of appellant presidential and vice-presidential candidates on the November, 1968 Minnesota general election ballot is reported at 290 F. Supp. 642 (D. Minn. 1968). The second opinion, dated July 14, 1969, granting appellants' motion to amend the complaint and dismissing the complaint is reported at 300 F. Supp. 1145 (D. Minn. 1969). These opinions are set forth in the Appendix at pp. 73, 86.*

* Hereinafter, the citation "A" refers to the Appendix. The citation "App." refers to the appendices to the appellant's brief.

Jurisdiction

Jurisdiction of this Court to review the determination of the statutory three-judge court of the United States District Court for the District of Minnesota rests upon 28 U.S.C. Sec. 1253. The judgment was entered by the three-judge court of the United States District Court on July 14, 1969; notice of appeal was filed on August 13, 1969, in the United States District Court for the District of Minnesota in the third division; the case was docketed on October 11, 1969; and probable jurisdiction was noted by this Court on January 12, 1970.

Statutes Involved

1. 50 U.S.C.A. 841 provides:

Sec. 841. Findings and declarations of fact

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party

objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchal chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed. Aug. 24, 1954, c. 886, Sec. 2, 68 Stat. 775.

2. 50 U.S.C.A. 842 provides:

Sec. 842. Proscription of Communist Party, its successors and subsidiary organizations

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the

Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or to any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, Sec. 3, 68 Stat. 776.

Questions Presented

1. Whether the three-judge court erred in dismissing the complaint on the ground of mootness, in view of the fact that there is uncontradicted evidence that the appellant Communist Party of Minnesota will participate in future Minnesota elections, and that the appellee Attorney General of the State of Minnesota has formally established State policy that 50 U.S.C. §§841 and 842 (Communist Control Act of 1954) prohibits appellants from appearing on any Minnesota election ballots, by a formal public opinion of the Attorney General to this effect and by maintaining this position before the three-judge court after the three-judge court granted temporary relief.

2. Whether 50 U.S.C. §842 of the Communist Control Act of 1954 bears the interpretation advanced in the court below by the United States Attorney for the District

of Minnesota as *amicus curiae* in order to avoid the constitutional questions which this case presents.

3. Whether 50 U.S.C. §§841 and 842 are bills of attainder in violation of Article 1, Section 9, Clause 3 of the U. S. Constitution, and when applied by the States, is a violation of Article 1, Section 10, Clause 1 of the U. S. Constitution, and an *ex post facto* law in violation of Article 1, Section 9, Clause 3 of the U. S. Constitution, and when applied by the States is a violation of Article 1, Section 10, Clause 1 of the U. S. Constitution.

4. Whether 50 U.S.C. §§841 and 842 violate freedom of speech, press, assembly and petition guaranteed by the First Amendment to the U. S. Constitution.

5. Whether 50 U.S.C. §§841 and 842 violate due process of law as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by not being reasonably restricted to the evil which they purport to control.

6. Whether 50 U.S.C. §§841 and 842 violate procedural due process of law as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by depriving an organization of liberty and property without affording those affected a hearing.

7. Whether 50 U.S.C. §§841 and 842 are within the legislative power of Congress in that Article 2, Section 1, Clause 2 of the U. S. Constitution limits the power of the federal government to interfere with the qualifications of federal presidential electors, and in that Congress does not have the power under the U. S. Constitution to regulate state and local elections.

8. Whether the refusal to accept the nominating petitions from appellants denied them equal protection of the laws.

Statement of the Case

The Communist Party of the State of Minnesota, hereinafter called Communist Party of Minnesota, is an unincorporated association whose principal place of business is in Minneapolis, Minnesota, and is the Minnesota-Dakotas District of the Communist Party, USA, also an unincorporated association, whose principal place of business is New York, New York. The Communist Party of Minnesota held a duly convened statewide convention on or about June 23, 1968, in the State of Minnesota and elected six delegates and an alternate delegate to the national convention of the Communist Party, USA, which was held from July 4, 1968, to July 7, 1968 (A. 21). At the Communist Party of Minnesota convention a motion was passed that if the Communist Party, USA nominated a presidential ticket, that the Communist Party of Minnesota would endeavor to place the Communist Party, USA candidates on the ballot of the Minnesota general election to be held November 5, 1968 (A. 21).

The Communist Party of Minnesota obtained the required ten candidates for the office of presidential elector and duly qualified them:

1. Elmer Borman
2. Rose E. Bruns
3. Obadiah Cummins
4. James Erickson
5. Nels Gudbrandson
6. Vernon Hartwig
7. Clara Jorgensen
8. Trygve Larsen

9. Carl Lund
10. Betty M. Smith

The Communist Party, USA ratified and approved the required ten Minnesota presidential elector candidates selected by the Communist Party of Minnesota (A. 5, 21).

Minnesota Statute 202.09 requires that a nominating petition for a state office on a state ticket contain signatures equal to one percent of the entire vote of the state cast at the last preceding general election, or 2,000, whichever is the lesser.

The Communist Party of Minnesota organized a campaign to recruit the necessary signatures on a petition to place the names of the Communist Party, USA and the names of Mrs. Charlene Mitchell as Presidential candidate and Mr. Michael Zagarell as Vice-Presidential candidate on the ballot of the Minnesota general election, November 5, 1968 (A. 21). This nominating petition contained the names of the ten who had qualified as presidential elector candidates of the Communist Party of Minnesota (A. 16).

In Minnesota, the names of the presidential electors do not appear on the General Election ballot but the names of the party and party's presidential and vice-presidential candidates do appear on the ballot, and according to Minnesota Statute 208.04, the vote for the party candidates for President and Vice President shall be deemed a vote for that party's presidential electors as filed with the Secretary of State of the State of Minnesota.

On Sunday, September 8, 1968, the Communist Party of Minnesota successfully concluded its campaign to recruit the requisite 2,000 signatures on the Communist Party,

USA nominating petition. The nominating petition contained 2,394 signatures of eligible voters in the State of Minnesota (A. 22). On Monday, September 9, 1968, representatives of the Communist Party, USA and the Communist Party of Minnesota went to appellee Minnesota Secretary of State Joseph L. Donovan's office to file the nominating petition (A. 22).

Minnesota Statute 202.11(2) allows filing of presidential elector nominating petitions up to and including primary election day, which in this case was Tuesday, September 10, 1968. The nominating petition was therefore duly tendered within the time limits prescribed by Minnesota Statute 202.11(2).

Communist Party, USA and Communist Party of Minnesota representatives arrived at the Secretary of State's office during the noon hour and were informed by an office employee that their petition would be refused. Thereafter they tendered the nominating petition for filing to appellee Minnesota Secretary of State Joseph L. Donovan. Appellee Donovan refused to accept the petition, although he did examine the contents of the petition and satisfied himself that it was the nominating petition for the Communist Party, USA (A. 16-17, 19).

Appellee Donovan gave the appellants a written refusal to accept the petition, which read:

September 9, 1968

TO ANY AND ALL PERSONS PRESENTING A NOMINATING PETITION OF THE COMMUNIST PARTY FOR FILING WITH THE SECRETARY OF STATE OF MINNESOTA FOR THE PURPOSE OF NOMINATING PRESIDENTIAL ELECTORS FOR THE GENERAL ELECTION OF 1968:

Please be advised that upon the advice of the Attorney General of Minnesota and at his direction as a matter of law, I hereby officially refuse and reject said petition.

Signed: JOSEPH L. DONOVAN /s/
Secretary of State

Appellee Donovan also handed the attorney for the Communist Party representatives an opinion of the appellee Attorney General of Minnesota, Douglas M. Head, which said:

September 9, 1968

You have requested our opinion as to whether you should accept for filing a nominating petition for presidential electors submitted pursuant to M.S. 1967 Sec. 202.10 on behalf of the Communist Party of the United States.

Your attention is directed to the Communist Control Act, 50 U.S.C. § 841 (1954) which provides, in part, as follows:

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a

conspiracy to overthrow the government of the United States. . . . therefore, the Communist Party should be outlawed.

Section 842 of the Communist Control Act declares that:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . .

In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petitions in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings.

Douglas M. Head /s/
Attorney General
State of Minnesota

The facts of the tender and refusal of the nominating petition are set forth at A. 22-23. The written refusal of appellee Donovan and the opinion of appellee Head are set forth at A. 48-50.

Appellants then brought an action in the court below, seeking a temporary and permanent injunction requiring appellee Secretary of State Donovan to accept and file the aforesaid nominating petition and to include the names of appellant candidates Charlene Mitchell and Michael Zagarell together with their Communist Party designation on the November 5, 1968, general election ballot. A declaratory judgment was also sought to declare the Communist Control Act of 1954, 50 U.S.C. Secs. 841 and 842 unconstitutional and void in that it violates the following provisions of the United States Constitution: Article 1, Section 9, Clause 3; Article 1, Section 10, Clause 1: Article 2, Section 1, Clause 2; and the First, Fifth, and Fourteenth Amendments to the United States Constitution (A. 4).

The following parties were plaintiffs below and are appellants in this appeal:

Mrs. Charlene Mitchell, the duly nominated candidate of the Communist Party for the office of President of the United States in the 1968 presidential election; the Communist Party, USA, an unincorporated association, a national political party which has as its principal place of business New York, New York; the Communist Party of Minnesota, an unincorporated association, which has as its principal place of business Minneapolis, Minnesota and is the Minnesota-Dakotas division of the Communist Party of the United States; Mrs. Betty M. Smith, Secretary of

the Communist Party of the State of Minnesota; ten presidential electors duly qualified according to Minnesota law and duly qualified and approved by the Communist Party, USA and the Communist Party of Minnesota; Mr. Earl Sorg and Mrs. Lynn Stein, citizens of the United States and eligible voters in the state of Minnesota, signers of the nominating petition, representing themselves and the class of 2,394 eligible voters of the state of Minnesota who signed the nominating petition; Mr. Fred Matsch, a citizen of the United States and an eligible voter in the State of Minnesota, who did not sign the nominating petition, representing himself and the class of all eligible voters in the state of Minnesota who have not signed the nominating petition.

On September 17, 1968 appellants filed a motion to convene a three-judge court, for a temporary restraining order, and for temporary relief (A. 51). On September 19, 1968 Chief District Judge Edward J. Devitt issued and filed an order convening a three-judge court (A. 53). On September 24, 1968 Chief District Judge Edward J. Devitt issued and filed a notice to the United States Attorney General, as required by 28 U.S.C. Sec. 2403, advising the U. S. Attorney General as to the constitutionality of an Act of Congress affecting the public interest being drawn in question, and also notice of hearing for temporary injunction, copies of which were enclosed (A. 55).

The three-judge court heard oral argument on September 30, 1968. In accordance with the provisions of 28 U.S.C. §2403, the Attorney General of the United States was advised by the court that he would be permitted to intervene for the presentation of evidence, if evidence were otherwise admissible in the case, and for argument on the question of the constitutionality of the law (A. 57).

Forrest Talbott, Assistant Secretary of State for the State of Minnesota, filed an affidavit which advised the court that October 4, 1968 was the last date on which the state could reasonably be expected to include the appellant party and the appellant candidates on the Minnesota general election ballot (A. 46).

The three-judge court granted a temporary injunction on October 2, 1968 reported at 290 F. Supp. 642 (D. Minn. 1968), which ordered the appellee Secretary of State to accept the appellants' nominating petitions and to place the names of the candidates together with their party designation on the November 5, 1968 general election ballot. The decision was based on a balancing of the equities and did not pass on the merits of appellants' claims. Appellee complied and the appellants' candidates names appeared on the ballot under the designation "Communist Party, USA" as ordered (A. 73).

The following votes were received by minority party candidates in the election:

Wallace and Griffin, American Party, nominated by petition, 66,931 votes;

Holstead and Boutelle, Socialist Workers Party, nominated by petition, 808 votes;

Blomen and Taylor, Industrial Government Party, nominated by petition, 285 votes;

Mitchell and Zagarell, Communist Party, U.S.A., nominated by petition, 415 votes;

Cleaver and Terry, Peace and Freedom Party, nominated by petition, 935 votes;

McCarthy, nominated by petition, 585 votes.

1,606,307 Total Ballots

After the November 5, 1968 general election, appellants moved to amend the complaint, adding paragraphs with a supporting affidavit stating that the Communist Party of Minnesota will participate in future Minnesota elections (A. 58, 62). Appellees moved to dismiss the complaint on the ground of mootness (A. 63). The three-judge court granted the motion to amend the complaint and then dismissed the amended complaint as moot (A. 86).

Summary of Argument

1. The 1968 elections did not moot this case.

The Minnesota Attorney General, at all stages of the litigation below, vigorously defended the constitutionality of the Communist Control Act and has never wavered from the position he took in his opinion to the Secretary of State that the Act bars Communist Party candidates from the ballot. Moreover, subsequent to the election, counsel for the Minnesota Attorney General advised the court below that the Attorney General would probably take the same position in future elections.

As the amended complaint alleges, the Communist Parties of the U. S. and Minnesota intend to field candidates in future elections as they have so frequently done in the past.

The questions of the application and constitutionality of the Communist Control Act are therefore "capable of repetition, yet evading review." Accordingly, the case is not moot.

2. The question of the constitutionality of the Communist Control Act cannot be avoided by interpretation.

It was the position of the United States Attorney in the court below that the provisions of the Minnesota election law permitting candidates of a party which has not gained recognition as an established party to secure a place on the ballot by petition does not confer any right or privilege on the party, but only on the candidates named in the petition. It was therefore argued that 50 U.S.C. 842, terminating the rights of the Communist Party, but not of its candidates, does not bar the latter from the ballot.

This argument cannot withstand analysis. As the United States Attorney acknowledged, enjoyment of the status of an established political party under Minnesota law is a "right" conferred by state law which 50 U.S.C. 842 purports to extinguish. But no political party can secure this right unless candidates of the party are placed on the ballot by petition and poll the requisite number of votes. Availability to an organization of the procedures for obtaining the status of an established political party is as much a "right" as is the right to enjoyment of the status when obtained.

The legislative history of the Act confirms this conclusion. It shows that Congress intended to bar the Communist Party from the ballot in any national, state or local election. Congress drew no distinction between the Party's appearance on the ballot as an established political party and as an aspirant to that status. And given the prevailing Congressional hostility to Communism, it is absurd to suppose that the authors of the Act would have tolerated any such distinction.

3. The Communist Control Act is a bill of attainder and *ex post facto* law.

The Act has all of the features of the classical form of attainder. It contains a legislative finding of guilt against the Communist Party, identified by name, inflicts punishment upon and in effect outlaws the Party by legislative fiat, and does not permit the Party to escape punishment by changing the nature of its activities.

Since the punishment which the Act inflicts on the Communist Party is based on supposed past conduct of the organization, the Act likewise violates the constitutional prohibition against *ex post facto* laws.

4. The Communist Control Act violates the First Amendment.

The Court has held that the right of individuals to associate for the advancement of political beliefs as well as the right of qualified voters, whatever their political persuasion, to cast their votes effectively are protected by the First Amendment. The Act abridges both of these rights.

If the Act's technique of taking away these rights by legislative fiat were constitutionally permissible, any transient majority could perpetuate itself in office by legislating its rivals off the ballot.

5. The Communist Control Act denies substantive due process because of its overbreadth.

The object of Congress in barring the Communist Party from the ballot could only have been to prevent it from using the electoral process for unlawful advocacy or to further unlawful goals. Yet there was no evidence before Congress that the Party had engaged in any such abuses. Moreover, the Act is not confined to the curb of abuse but bars the Party from access to the ballot for peaceable and

legitimate political purposes. Such a sweeping and indiscriminate deprivation is impermissible under the Fifth Amendment.

6. The Communist Control Act denies procedural due process.

The Act flagrantly violates the due process principle that Congress may not deprive an organization of liberty or property without according it a hearing and opportunity to refute the charges relied on to support the deprivation.

7. The Communist Control Act, as applied in this case, is not within the legislative power of Congress.

Art. II, sec. 1, cl. 2 of the Constitution gives the States the exclusive authority to prescribe the qualifications of presidential electors. The role of the Congress under the Constitution is restricted to protecting the right to vote and the right of individuals to stand for public office. It is without power to abridge or qualify these rights.

8. The action of appellees in barring the Communist Party from the ballot denied appellants the equal protection of the law by arbitrarily discriminating against them as compared with other parties, candidates and voters.

ARGUMENT

1. ***Where temporary relief is granted it cannot be claimed that the granting of the temporary relief caused the original action to become moot where a federal statute remains in effect to be used to inhibit the appellants' electoral activities.***

The Communist Control Act of 1954, 50 U.S.C. §§841 and 842, retains the same force and effect it had prior to the 1968 elections. No formal judicial decision on the merits of appellants' constitutional claims has been made which will govern future application of the Communist Control Act to appellants' political plans. Appellees are thus free to repeat their past conduct and to continue to maintain that the Communist Control Act of 1954 prohibits candidates of the Communist Party from appearing on the ballot.

Appellee Minnesota Attorney General published an official opinion ruling that the Communist Control Act, 50 U.S.C. §§841 and 842, bars Communist Party candidates from the ballot and agreed that "any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings" (A. 49). Moreover, the appellee Attorney General indicated to the court below that he will persist in his view that the Communist Control Act bars the Communist Party from the ballot. In a hearing before Chief Judge Devitt on November 25, 1968, after the election, the following exchange took place:

> The Court: On another subject, I notice that counsel's affidavit says on information and belief he has learned that you, or the attorney general, are going to persist in your viewpoint so that if some other Communist

affiliated people file, you are going to take the same position.

Is there any basis for this information and belief?

Mr. Kyle: I think there probably is. At least there is no new case law which has come down which would, as far as I am concerned, dictate a different result, ultimately (A. 69).

The Minnesota Attorney General, in the litigation below, has vigorously defended the constitutionality of the Communist Control Act and has never wavered from his position that the Act bars Communist Party candidates from the ballot. Except for the single *amicus curiae* brief filed in the litigation below by the United States Attorney for the District of Minnesota, Patrick J. Foley, on September 23, 1968, taking the position that the Communist Control Act does not bar candidates in Minnesota, there is no authority for the proposition that the Communist Control Act does not apply to elections (App. A, *infra*).[1]

Appellee Minnesota Attorney General maintains that the legislative history of the Act bars Communist Party candidates from participating in elections. He cites *Salwen* v. *Rees*, 16 N.J. 216, 108 A.2d 265 (1954) holding that the Communist Control Act was applicable to a New Jersey local election, barring a Communist Party candidate from the election. Appellants agree that this is the only reported decision as to the applicability of the Act to elections.

In his brief below, among other authorities,[2] the appellee Attorney General also cited an opinion of the Attorney

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[1] The position of the United States Attorney is discussed at pp. 25-31, *infra*.

[2] 100 Cong. Rec. 14082, 13837, 14087, 14909, 14092 (daily ed. Aug. 17, 1954); . . . "Federal Anti-subversive Legislation of 1954,"

General for the State of Connecticut, dated January 17, 1964, to support his contention that the Act intended to bar the Communist Party from participation in elections:

> Honorable Ella T. Grasso, Secretary of State,
> 30 Trinity Street, Hartford, Connecticut
>
> Dear Mrs. Grasso:
>
> This is to acknowledge the receipt of your letter dated January 9, 1964, in which you enclosed a photo copy of a letter from Mr. Arnold Johnson, Public Relations Director of the Communist Party, U.S.A., dated January 8, 1964. For your information, this office also received the same letter from Mr. Johnson.
>
> In his letter, Mr. Johnson advises that the Communist Party plans to place candidates on the ballot in this state in the 1964 elections and asks for information concerning our election laws in that regard.
>
> Your question to this office is stated as follows:
>
> "Will you be so kind as to give me your opinion as to the specific laws, if any, which apply to the rights of the Communist Party, or to a Communist candidate to be on the ballot in Connecticut in the November 1964 election."
>
> In 1954, the Congress of the United States passed the Communist Control Act which is now contained in Sections 841-843 of Title 50 of the United States Code.

* * * * *

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55 *Colum. L. Rev.* 631, 706, 709, 724-730 (1955); "The Communist Control Act of 1954," 53 *Mich. L. Rev.* 1153, 1159 (1955); Auerbach, "The Communist Control Act of 1954: A Proposed Legal Political Theory of Free Speech," 23 *U. Chi. L. Rev.* 173, 175 (1956).

> From the above, [Sections 841 & 842] it is crystal clear that the Communist Party has no right to be on the ballot in the elections to be held in Connecticut in November, 1964. The same would hold true for any avowed candidate of said party.
>
> Very truly yours,
>
> /s/ HAROLD M. MULDEY
> *Attorney General*

Thus, the appellee Attorney General has consistently maintained the position that the Communist Control Act is constitutional and bars Communist Party candidates from the ballot, and he has opposed the *amicus curiae* position of the United States which suggested that the Communist Control Act need not bar candidates from the ballot. In the absence of a judicial determination, the only reasonable conclusion is that the same decision will be reached by the appellee Minnesota Attorney General or his successors when Communist candidates run in future elections.

The Communist Party, its predecessors and branches, and Communist Party candidates, have participated in 163 election contests across the country and in Minnesota from 1924 to 1949. These are set forth in App. B, *infra*. As indicated by the opinion of the Connecticut Attorney General, *supra*, the Communist Party attempted, unsuccessfully, to run candidates in the 1964 Connecticut elections. From 1949 to 1968, the Communist Party and Communist Party candidates did not participate in elections. As stated in the affidavit of the Secretary of the Communist Party of Minnesota, "In the 1950's and early 1960's the Communist Party of Minnesota did not participate in state and local

elections because of the repressive political climate" (A. 61).

The next election in which Communist candidates successfully participated was the 1968 Presidential election. Appellants Mitchell and Zagarell appeared, in addition to the Minnesota election, on the Washington State ballot, but under some other designation. Elsewhere in the country they ran as write-in candidates. In 1969, Rasheed Storey and Jesus Colon appeared on the New York City ballot as Communist Party candidates for mayor and comptroller.

This extensive history of participation of the Communist Party and its candidates in elections, and the uncontradicted affidavit of Mrs. Betty M. Smith, stating that the Communist Party will participate in future Minnesota elections, indicates that a controversy still exists that requires judicial resolution to prevent a repetition of the litigation to secure a place on the ballot for Communist candidates.

This Court has consistently granted review and decided election cases after the November 5, 1968 general elections. *Allen* v. *State Board of Elections*, *Fairley* v. *Patterson*, *Bunton* v. *Patterson*, and *Whitley* v. *Williams*, 393 U.S. 544 (1969); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Hadnott* v. *Amos*, 394 U.S. 358 (1969); *Hall* v. *Beals*, 90 S. Ct. 200 (1969); and *Brockington* v. *Rhodes*, 90 S. Ct. 206 (1969). Thus, this Court has not found election cases moot merely because the election has passed.[3] Rather, as this Court

[3] In *Hall* v. *Beals*, *supra*, the case was mooted because the Colorado legislature amended the statute under review after this Court had noted probable jurisdiction. In *Brockington* v. *Rhodes*, *supra*, this Court ruled the case was moot because the petitioner had requested only mandamus, which could not be granted after the election, did not allege that he intended to run for office in the future, and did not sue for himself and others similarly situated as independent voters.

stated in *Moore* v. *Ogilvie, supra,* the fact of the past occurrence of an election does not require dismissal of the complaint based on official practices in that election where there is an indication of future repetition:

> Appellees urged in a motion to dismiss that since the November 5, 1968 election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which *MacDougall* v. *Green, supra,* allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore "capable of repetition, yet evading review," *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, 515.

Although the appellant candidates did appear on the Minnesota general election ballot on November 5, 1968, as they desired, *only the order of the court below made their appearance possible.* But for that order, the appellees, Minnesota Attorney General, and Minnesota Secretary of State, would have continued to refuse to accept appellants' petition for nomination and to place appellants' names on the ballot. Without judicial resolution of the issues presented here, there is no reason to believe that their position will change.

Minnesota election officials will certainly follow the appellee Minnesota Attorney General's opinion advising that the Communist Control Act of 1954, 50 U.S.C. §§841 and 842 bars Communist Party candidates from the ballot. While Attorney General opinions are not binding, they will

be followed by all state officials unless the state official wishes to challenge the ruling by court action, hardly a possibility. Thus without judicial resolution of the merits of appellants' claims, the Minnesota Attorney General ruling will, practically speaking, have the force of law.

Appellees urged the dismissal of this case as moot in view of the fact that temporary relief had placed the Communist Presidential and Vice Presidential candidates on the Minnesota ballot, and that the election was over. The three-judge court agreed:

> In our view, the issues raised by the original pleadings are now moot since the plaintiffs' nominating petitions were accepted and their names and their party designation were placed on the ballot for the 1968 Presidential election (App. 88-89).

But in *Gray* v. *Sanders*, 372 U.S. 368, 375 (1963), this Court stated, in reference to a procedurally similar circumstance:

> . . . [W]e think the case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and longstanding. For if the case was dismissed as moot appellants would be "free to return to . . . [their] old ways." *United States* v. *W. T. Grant Co.*, 345 U.S. 629.

See, e.g., *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *South Pacific Terminal Company* v. *I. C. C.*, 219 U.S. 498 (1911); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Bohler* v. *Lane*, 204 F. Supp. 168, 173 (D. Fla. 1962); *Morris* v. *Williams*, 149 F.2d 703, 708 (8th Cir. 1945); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N.D. Cal. 1964), 381 U.S. 301 (1965); *Friends* v. *United States*, 388 F.2d 579, 581 (D.C. Cir. 1967); and *Tyson* v. *Cages*, 363 F.2d 742, 743 (5th Cir. 1966).

The three-judge court, in its opinions of October 2, 1968 and July 14, 1969, acknowledged that there are serious constitutional objections to the Communist Control Act, 50 U.S.C. §§841 and 842; the U. S. Attorney in his *amicus curiae* brief to the three-judge court admitted that there are serious constitutional objections to the Communist Control Act, 50 U.S.C. §§841 and 842; and Mr. Justice Harlan, in the only case in this Court dealing with the Communist Control Act, 50 U.S.C. §§841 and 842, *Communist Party, U. S. A.* v. *Catherwood*, 367 U.S. 389 (1961), noted serious constitutional objections to the Communist Control Act, 50 U.S.C. §§841 and 842. The merits of appellants' claims should be determined.

2. *50 U.S.C. §842 of the Communist Control Act does not bear the interpretation advanced in the three-judge court below by the United States Attorney for the District of Minnesota as amicus curiae in order to avoid the constitutional questions that this case presents.*

At the request of the court below, the United States Attorney submitted a memorandum on September 23, 1968 for the United States as *amicus curiae*, which sought to avoid the question of the constitutionality of the Communist Control Act by advancing an interpretation of 50 U.S.C. §842 which would make it inapplicable to the case

at bar (A. 78; App. A. *infra*). The memorandum takes the position that since the Communist Party is not an established political party as defined by Minnesota state election law (Minnesota Statutes 200.02, Subd. 7), persons such as appellants Mitchell and Zagarell who seek nomination to public office as its representatives must do so by means of petitions which specify the offices they seek and the party they represent, and which bear the signatures of the requisite number of voters (Minn. Statutes 202.09, 202.10). The U. S. Attorney advances the theory that these state laws allowing nomination by petition confer no right, privilege, or immunity upon the Communist Party, but only upon the individual candidates named in the petition. He argues that since 50 U.S.C. 842 does not purport to terminate the rights of individuals, it does not bar the nomination by petition of candidates who represent the Communist Party. This argument will not withstand analysis and is belied by the legislative history of the Communist Control Act.

The memorandum acknowledges, as it must, that enjoyment of the status of an established political party, as defined by Minnesota Statutes 200.02, Sub. 7, is a "right" conferred by state law and is therefore within the ambit of 50 U.S.C. 842 of the Communist Control Act. But by the terms of Minnesota Statute 202.02 a party can secure this status only if a candidate polls at least 5% of the statewide vote. A vote for such a candidate, therefore, is likewise "a vote for party enthronement." *Salwen v. Rees*,

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[4] Political parties having this status nominate candidates for presidential electors at party conventions (Minn. Statutes 208.03) and other candidates at party primaries (Minn. Statutes 202.08).

16 N.J. 216, 217.* The opportunity which the election law extends to an organization to seek "enthronement" as an established political party is as much a right as is the right to enjoy all the advantages which the election law gives to occupants of the throne. This must be so, since enjoyment of the latter right is contingent upon the availability to the organization of the procedures for securing it. Accordingly, the Communist Party has a right under Minnesota election-laws as the representative of the candidates named in the petition. It follows that the right is one which 50 U.S.C. §842 of the Communist Control Act, if constitutional, extinguishes.

This conclusion is confirmed by the legislative history of the Communist Control Act, 50 U.S.C. §842.

The Communist Control Act was passed in August, 1954, on the eve of the adjournment of Congress for the national election campaign. It had its origin in the Butler Bill, S. 3706, 83d Cong., 2d Session (100 Cong. Rec. 14097, 1954) to amend the Internal Security Act by making provisions with respect to "communist infiltrated organizations." The text of the section was lifted verbatim from Section 2 of

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*Salwen sought to run for membership on the Board of Chosen Freeholders of Mercer County, New Jersey. The Communist Party not having polled 10% of the votes in the previous election was not entitled to a place on the ballot automatically, but Salwen had obtained the requisite number of names on the nominating petition and requested that the designation "Communist Party" be printed on the ballot next to his name. The lower court upheld the action of the county clerk in refusing to let Salwen's name appear on the ballot, rejecting Salwen's contention that he was running as an individual. The court said: "It is the plaintiff's fault who insists upon identifying himself with the party and becoming its embodiment . . . [He] proclaims himself the candidate of the Communist Party, and proclaims to the electorate that a vote for him is a vote for the party enthronement." The New Jersey Supreme Court affirmed *per curiam* on the oral opinion below.

H.R. 7894, 83d Cong., 2d Session, introduced by Representative Dies. In hearings on his bill, Mr. Dies replied in the affirmative to the question whether it "would remove from the political ballots the Communist Party." Hearings on internal security before subcommittee No. 1 of the House Committee of the Judiciary, 83d Congress, 2d Session, p. 22 (1954).* The same view of 50 U.S.C. §842 of the Communist Control Act was expressed in the floor debates on it. 100 Cong. Rec. 14644 (Representative Celler; *id.* 14653 (Senator Pfost); *id.* 14713 (Senators Kefauver and Butler). Senator Humphrey doubted the power of Congress to exclude the Communist Party from state ballots; *id.* 14717, 14722. But neither he nor any other Congressman questioned that this was the effect of the section.

Thus, "it is clear from the debate that the Act was intended to bar the Communist Party from appearing on the ballot in any national, state or local election." Auerbach, The Communist Control Act of 1954, 23 *U. Chi. L. Rev.* 173, 175. See also comment in 53 *Mich. L. Rev.* 1153, 1159; 64 *Yale L. J.* 712, 738-744 (1955); 55 *Colum. L. Rev.* 631, 706, 709, 724-730 (1955); "The Communist Control Act of 1954," 53 *Mich. L. Rev.* 1153, 1159 (1955). This is the one conclusion that emerges from the otherwise unilluminating history of 50 U.S.C. §842. Cf. *Communist Party* v. *Catherwood*, 367 U.S. 389, 392-93 (1961).

In barring the Communist Party from the ballot, Congress of course drew no distinction between its appearance there as an established political party and as an aspirant to that status. Given the bitter hostility to the Communist Party and Communism evinced by every participant in the

* The text of H.R. 7894 appears at page 8 of these hearings.

debate, it cannot be supposed that the authors of 50 U.S.C. 842 would have tolerated any such distinction had it been called to their attention.

While the United States in its memorandum suggested to the court that the individual candidates could use the designation Communist Party as an espousal of its principles (App. A, *infra*, p. 3a), the memorandum does not face up to the question of whether the Communist Party as a political party in Minnesota could enjoy the rights and privileges as conferred in Minnesota election laws as explained above.

What remains to be shown is that the Communist Party as a political party has a constitutional right to participate in the benefits conferred by the Minnesota election laws, and that, by denying these rights, the Communist Control Act is unconstitutional.

This Court has consistently held that the right to vote is protected by the Constitution. *See Wiley* v. *Sinkler*, 179 U.S. 58 (1900); *Swafford* v. *Templeton*, 185 U.S. 487 (1902); *U. S.* v. *Classic*, 313 U.S. 299, 314-316 (1941); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1963); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Davis Assessor-Collector of Taxes, Bexar County, Texas, et al.* v. *Mabry et al.*, 380 U.S. 251 (1965), affirming 232 F. Supp. 930 (1965); *Ray* v. *Blair*, 343 U.S. 214 (1952); and *Harmon* v. *Forssenius*, 380 U.S. 528 (1965).

As has been shown, political parties and organizations in Minnesota have rights under Minnesota election laws as do individual candidates running for office. It is elementary that a substantial part of the electoral process in this country is founded on the participation by political parties

in the political process by the endorsement and identification of candidates as political party candidates. The Minnesota election law structure authorizes participation of political parties in the electoral process as well as participation of individual candidates. Thus the conclusion is inescapable that the political party's right to participate is as much a right as the individual's right to participate. See *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Even in *Salwen, supra*, where the plaintiff urged that the Communist Control Act did not apply because the Party was not a plaintiff, the court found that the Act did apply because the Communist Party could run candidates in the election without Party designation. Even under these circumstances, the court was:

> . . . impressed with the idea that this particular method, as chosen by the plaintiff, is a keen way of circumventing the statute, because if it were valid for him to take the course that he has chosen, it would be valid for a complete set of candidates to do the same thing, the consequences of which, of course, would be to frustrate completely the designs of the federal law. (108 Atl. 2d at 266.)

Of course in the case at bar, the Communist Party, USA, and the Communist Party of Minnesota are appellants. They both would be deprived of their constitutionally protected rights to run candidates in Minnesota if the appellees' action is allowed to stand, and the appellant organizations have standing to seek redress of this denial of their rights. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Thus, this case, unlike *Communist Party* v. *Catherwood, supra*, permits no escape from

facing up to the constitutional questions which 50 U.S.C. §842 presents.

3. *The Communist Control Act, 50 U.S.C. §§841 and 842 is an unconstitutional bill of attainder and ex post facto law.*

The Act is a classical bill of attainder:

1. The Act outlaws the Communist Party by legislative fiat,
2. The Act makes a legislative finding of guilt,
3. The Act inflicts punishment, and,
4. The Act allows no escape from its provisions, even if the Communist Party changes its character as defined by the Act.

There are few governmental practices which are more oppressive of individual liberty than the imposition of bills of attainder. The framers of the Constitution had fresh in their minds the oppressive English practice whereby a man guilty of crime was put beyond protection of the law. Pollock and Maitland, *History of English Law*, vol. 1, p. 476, vol. 2, p. 449 (2d ed. 1923).

The so-called "findings of fact" in 50 U.S.C. §841 of the Communist Control Act are unprecedented in our law but find their counterpart in the abhorrent test-oath laws of the Tudor period in England. For example, the law 35 Eliz. c. 2 was supported by this finding of fact:

> Sundry wicked and seditious Persons, who terming themselves catholicks, and being indeed Spies and intelligencers, . . . and hiding the most detestable and devilish Purposes under a false Pretext of Religion and Conscience, do secretly wander and shift from

> Place to Place within this Realm, to corrupt and seduce her Majesty's Subjects, and to stir them to Sedition and Rebellion.

For a further treatment of the Catholic-Protestant and Protestant-Catholic conflicts in which there was widespread use of bills of attainder, see the appendix to Justice Black's concurring opinion in *Joint Anti-Fascist Comm.* v. *McGrath*, *supra*.

Nor was the practice limited to England and Ireland. In Massachusetts, in 1656, a law was enacted which provided:

> Whereas there is an accursed set of heretics lately risen up in the world, which are commonly called Quakers, who take upon them to be immediately sent of God, and infallibly assisted by the spirit, to speak and write blasphemous opinions despising government, and the order of God in church and commonwealth, speaking evil of dignities, reproaching and reviling magistrates and ministers. . . .

The statute then provided that on the arrival of such Quakers, they were to be severely whipped and confined to hard labor in the House of Correction. Chandler, *American Criminal Trials*, pp. 35-36 (1844).[7] It is understandable, therefore, that the provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate.

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[7] English law gives us an example of similar legislation in the statute suppressing by name the "Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and the London Corresponding Society," 39 Geo. III., c. 79 (1799). And compare the legislation in Ireland, suppressing by name the Catholic Association, which advocated the admission of Roman Catholics to full civil and political rights. 10 Geo. IV, c. 1 (1829).

The Communist Control Act has all of the characteristics of a bill of attainder as set forth in *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277, 18 L. ed. 356 (1867). This Court there noted three chief characteristics of a bill of attainder: it applies to named individuals, or an easily ascertainable class; it includes a legislative finding of guilt; and it contains a legislatively enacted punishment.[8] The Missouri oath did not apply to named individuals; it applied to an easily identifiable class of people—those who had supported the South during the Civil War. This Court noted that "the bills are generally directed against individuals by name, but they may be directed against a whole class." 4 Wall. (71 U.S.) at 323. *Cummings* specifically rejected Missouri's contention that the oath was not a bill of attainder in that it did not deprive one of "life, liberty or property":

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment; . . . . *Disqualification from office may be punishment.* 4 Wall. (71 U.S.) at 320.
>
> In France, deprivation or suspension of civil rights, or some of them, and among these of *the right of voting, of eligibility to office*, ... are punishments prescribed by her code.
>
> The theory upon which our political institutions rest, is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happi-

[8] The Court said, "In these cases [bill of attainder] the legislative body . . . pronounces upon the guilt of the party, without any of the forms or safeguards of a trial: . . . and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." 4 Wall. (71 U.S.) at 323.

> ness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights, all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined .... 4 Wall. (71 U.S.) at 321 [Italics supplied].[9]

Similarly, in *Ex Parte Garland*, 4 Wall. (71 U.S.) 333 (1867), this Court found that a statute excluding from practice in the federal courts attorneys who had not taken an oath as to their past loyalty to the United States was an unconstitutional bill of attainder. This Court said there that "exclusion from any of the professions or from any of the avocations of life for past conduct can be regarded in no other light than as punishment for past conduct." 4 Wall. (71 U.S.) at 377. In *Lovett* v. *United States*, 328 U.S. 303 (1946), this Court applied the bill of attainder prohibition to Section 304 of the Emergency Appropriations Act of 1943 (57 Stat. 431, 450), which provided that none of the funds therein appropriated could be used to pay salaries to three named individuals. The Court reaffirmed earlier bill of attainder cases and made it clear that a bill of attainder could apply to specifically named individuals:

> Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned (*Cummings* and *Garland*), it operates as a legis-

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[9] This Court also found the oath at issue to be an ex post facto law. Inasmuch as 50 U.S.C. §§841 and 842 punish the Communist Party by stripping it of all "rights, privileges and immunities" solely on the basis of a legislative determination based upon supposed past conduct of that named organization, the Act is an ex post facto law prohibited by the Constitution. *Cummings* v. *Missouri*, *supra*, *Ex Parte Garland*, 4 Wall. (71 U.S.) 333 (1867) and *Fletcher and Peck*, 6 Cranch 87, 3 L.ed. 162.

lative decree of perpetual exclusion from a chosen vocation. This permanent proscription from any opportunity to serve the government is punishment, and of a most severe type."

Recently, this Court found a bill of attainder in *U. S.* v. *Archie Brown*, 381 U.S. 437 (1965), holding unconstitutional Section 504 of the Labor Management Reporting and Disclosure Act (1959), which made it a crime for a member of the Communist Party to serve as an officer of a union. Archie Brown was an avowed Communist who had been elected to the executive board of Local 10 of the International Longshoremen's and Warehousemen's Union for consecutive one year terms in 1959, 1960 and 1961. He was convicted in 1961 for violation of Section 504. The Court reaffirmed *Cummings*, quoted at 381 U.S. at 448 and *Lovett*, quoted at 381 U.S. at 448-449.

And in *American Communications Assoc.* v. *Douds*, 339 U.S. 382 (1949), this Court said that Section 9(h) of the National Labor Relations Act which required union officers to file with the board an affidavit that they were not members of the Communist Party was not a bill of attainder, noting that a member of the Communist Party could escape the provision by resigning.

The Communist Control Act clearly fits the three tests of a classical bill of attainder and it meets the *Douds* criteria that the Communist Party can do nothing to escape the provisions of the Act. The Act meets the first criterion inasmuch as the organization is named: 50 U.S.C. §842 provides, "the Communist Party of the United States, or any successors of such party, regardless of the assumed name, . . . are not entitled to any of the rights, privileges

and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof." And in the "findings of fact" in 50 U.S.C. §841, there is the flat conclusion in the final sentence, "Therefore, the Communist Party should be outlawed." The second criterion of a legislative finding of guilt is squarely met. In 50 U.S.C. §841, Congress "finds and declares" that the Communist Party is "in fact an instrumentality of a conspiracy to overthrow the government of the United States." And Congress finds that the Communist Party is dedicated "to the proposition that the present Constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States." And in 50 U.S.C. §842 Congress finds that the Communist Party's "object or purpose is to overthrow the government of the United States." There is no comparable example, in the entire history of the United States, of such a flat legislative finding of guilt in the absence of a judicial trial. Finally, the third criterion of punishment inflicted is abundantly fulfilled. 50 U.S.C. §842 provides:

> The Communist Party, . . . or any successors of such Party regardless of the assumed name . . . are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivisions thereof; and whatever rights, privileges and immunities which have heretofore been granted to said Party or to any subsidiary organization by reason

> of the laws of the United States, or any political subdivision thereof, are terminated.

See also *Fleming* v. *Nester*, 363 U.S. 603, 614 (1960); *Communist Party, U.S.A.* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961).

The United States, in its memorandum below, also indicated that the Act is an illegal bill of attainder:

> Perhaps the most obvious challenge to Section 3 of the Communist Control Act is that it operates as a "bill of attainder." Unlike the Subversive Activities Control Act, it abrogates rights by "legislative fiat" (*Communist Party* v. *Catherwood*, 367 U.S. at 394), without trial or hearing. And subject is directly identified by name. If the consequences for the Party and its members may properly be characterized as punishment, the provision would "seem to work an impermissible attainder." (See *U. S.* v. *Brown*, 381 U.S. 437) (App. *infra*, p. 5a).

This position of the Justice Department is not new. On March 9, 1948, the U. S. Department of Justice sent a letter to the chairman of the Committee on House Administration, which was at the time considering legislation aimed at restricting the activities of the Communist Party. The bill under consideration (H.R. 4482) would have banned from the ballot in any election in the United States all political parties directly or indirectly affiliated with the Communist Party of the United States, Communist International, or any other foreign agency which advocates forceful overthrow of the government. The Justice Department letter said (quoted in Note, 34 U. Va. L. Rev. 450):

> Although this Department is in complete sympathy, of course, with the desire that no subversive or disloyal person should be permitted to hold a position of honor, trust or profit in the government, it is believed that the bill under consideration would be of doubtful validity and enforceability for several reasons, the most outstanding of which are that it might be regarded as in the nature of a bill of attainder, a denial of due process of law, and an attempt by the federal government to legislate, in so far as it would apply to the qualifications of a political party in any election, in a field for which no Federal authority exists.

It is abundantly clear that the Communist Control Act §§841 and 842, is a bill of attainder. This Court should invalidate it.

4. *The Communist Control Act, 50 U.S.C. §§841 and 842 violates freedom of speech, press, assembly and petition.*

The Communist Control Act, 50 U.S.C. §§841 and 842, violates freedom of speech, press, assembly and petition.

The Court held only last term that "the two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" are guaranteed by the First Amendment. *Williams* v. *Rhodes*, 393 U.S. 23, 30-31; and see also at 38-39 (concurring opinion). The Communist Control Act abridges both of these rights.

Minority political parties participate in the electoral process to espouse their political ideology and to propose

solutions for the problems that face society. By such participation, they can obtain a larger and more attentive audience than they could through the use of other less effective vehicles for public debate.

Freedom of speech does not exist in a vacuum. The right to speak implies the right to be heard. Historically, one of the significant ways in which minority parties and minority party ideologies have been heard is in their participation in local, state and federal elections. The importance of "third" or minority parties has been pointed out by William Hesseltine (*Third Party Movements in the United States* (1962) at pp. 13, 100):

> Frequently, third parties were the vehicle through which a new idea or policy was launched and tested. When a new proposal met a favorable reception, it was adopted by a major party. . . .
>
> Perhaps the major role that third parties have played has been that of promoting new governmental ideas and programs. Many reforms which were first offered by third parties were, in time, and after they had received wide popular approval, accepted and put into operation by the major parties.

This Court has repeatedly stressed that the purpose of the freedoms of speech, assembly, press and petition is to insure dissemination of the widest possible range of political, social and economic views. *Associated Press* v. *U. S.*, 326 U.S. 1 (1944); *Stromberg* v. *California*, 283 U.S. 35 (1931). Further, the First Amendment protects advocacy not only of the orthodox but also "unorthodox ideas,

controversial ideas, even ideas hateful to the prevailing climate of opinion." *Roth* v. *United States,* 354 U.S. 476 (1957).

By stripping the Communist Party of "all rights, privileges and immunities" Congress has attempted to extinguish its free speech and that of its members by destroying its organization. This it cannot do. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as more than once this Court has recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958).

This Court has specifically recognized the right of citizens to advocate communism by speech, press and the ballot. In *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 592 (1952), Mr. Justice Jackson speaking for the Court said:

> Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by the press, speech and assembly. This means freedom to advocate or promote communism by means of the ballot box, but it does not include the practice or incitement of violence.

Equally protected by the First Amendment is the right of the citizen to express his viewpoint through voting for a particular candidate or party. Citizens do not have this right if parties and candidates which espouse viewpoints

which they wish to support are banned from the electoral process.[10]

It must be remembered that *Speiser* v. *Randall*, 357 U.S. 513 (1958) decided that where a statute implicates First Amendment rights, a person who claims benefits under it may not be required to prove that he is a fit person to enjoy them—it is the government which must bear the burden of proving the contrary. The Act goes far beyond the statute invalidated in *Speiser* by dispensing altogether with proof of the Communist Party's unfitness and substituting a legislative fiat. If this were permissible, a transient majority could perpetuate itself in office by legislating its rivals off the ballot on the basis of a similar fiat. The First Amendment does not countenance such a result.

5. *The Communist Control Act, 50 U.S.C. §§841 and 842, violates due process of law as protected by the due process clause of the Fifth Amendment by not being reasonably restricted to the evil which it purports to control.*

Governmental regulation must have a real and substantial relation to the object sought to be attained, and legislation not reasonably restricted to the evil with which it is said to deal violates due process. *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934) and *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

The object sought to be attained by Congress in barring the Communist Party from the ballot could only have been to prevent the Party and its candidates from using the electoral process as a means of engaging in unlawful ad-

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[10] See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-251 (1957).

vocacy or furthering unlawful goals. Yet, although the Party has a long history of running candidates for public office (App. B, *infra*), there was no evidence before Congress that the Party employed election campaigns for any illegitimate purpose. Congress held no hearings on the subject and no such evidence was adduced or referred to in the floor debate.

Moreover, the prohibition of the Communist Control Act is not limited to curbing abuses of the electoral process by the Communist Party. It bars the Party from access to the ballot for peaceable and legitimate political purposes. The Act therefore violates the principle that, "[T]he legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *De Jonge* v. *Oregon*, 299 U.S. 353, 364-65 (1937). The Act, in disregard of this precept would "burn the house to roast the pig." *Butler* v. *Michigan, supra*, at 383.

The Communist Control Act, in effect, establishes an irrebuttable presumption that the Communist Party and its candidates, if allowed to appear on the ballot, will use their appearance to further unlawful objectives. This presumption is contrary to experience and flies in the face of decisions of the Court. For, whatever else may be charged against the Communist Party, it undeniably engages in peaceable advocacy and political activity. *Noto* v. *United States*, 367 U.S. 290, 299 (1961). And knowledge of unlawful purposes of the Party or an intent to effectuate them may not be imputed to individuals solely because of their membership in the organization. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of*

Regents, 385 U.S. 589 (1967). Much less may such knowledge and intent be imputed to candidates of the Party solely by virtue of their candidacies.

Aptheker v. *United States, supra,* is controlling here. That case invalidated section 6 of the Subversive Activities Control Act which prohibited members of the Communist Party from applying for or using passports. The Court noted (at 511) that the section "establishes an irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States." It found, however (at 514), "that our national security can be adequately protected by means which, when compared with §6, are more discriminately tailored to the constitutional liberties of individuals." Accordingly, this Court held the section unconstitutional because (at 514) it "sweeps too widely and too indiscriminately across the guarantees in the Fifth Amendment." The Communist Control Act violates the Fifth Amendment for the same reason.

6. *The Communist Control Act, 50 U.S.C. §§841 and 842, violates procedural due process of law.*

Government may not take away liberty or property without providing certain fundamental procedures of fairness. The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the charges against it which are relied upon to support the deprivation. As this Court said in *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra*:

> This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous

> loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. (At 168, concurring opinion.)

The Communist Control Act does not provide any procedural safeguards to those to be punished, not even a hearing. Instead, 50 U.S.C. §841 finds that "the Communist Party is a criminal conspiracy designed to overthrow the United States government," and 50 U.S.C. §842 deprives that organization of "all rights, privileges, and immunities" by legislative fiat.

A legislature may not substitute its own finding of fact for proof at a hearing of any fact required to support charges. *McFarland* v. *Amer. Sugar Refining Co.,* 241 U.S. 79 (1916); *Manley* v. *Georgia,* 279 U.S. 1 (1929); and *Tot* v. *United States,* 319 U.S. 463 (1943).

The Communist Control Act violates this principle. The denial of due process could not be more flagrant.

7. *The Communist Control Act of 1954 is not within the legislative power of Congress.*

Article 2, Section 1, Clause 2 of the U. S. Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct; a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This provision of the Constitution removes the power of the federal government to interfere with the qualification of federal presidential electors. Both the Minnesota Attorney General and the U. S. Attorney argued below that the Communist Control Act infringes upon the power of the states in this regard. Appellants agree, inasmuch as the role of Congress under the Constitution is restricted to protecting the right to vote and the right of individuals to seek public office. It is without power to abridge or qualify these rights. *McPherson* v. *Blacker,* 146 U.S. 1 (1902).

Congress has, of course, undertaken to protect the right to vote by federal laws designed to prevent certain corrupt practices in regard to federal elections. This is the proper role of the federal government in guaranteeing the integrity of the right of the citizen to vote as protected by the U. S. Constitution, and does not contravene Article 2, Section 1, Clause 2. In *Burroughs and Cannon* v. *U. S.,* 290 U.S. 534 (1934) this Court sustained the constitutionality of the federal Corrupt Practices Act of 1925 against a challenge that it contravened Article 2, Section 1, Clause 2 of the U. S. Constitution. This Court cited *In re Green, supra,* for the proposition that presidential electors are not officers or agents of the federal government and held that Congress had the power to pass appropriate legislation to *safeguard* such an election from the improper use of money to influence the result. This Court also discussed *Ex parte Yarborough,* 110 U.S. 651 (1884), which upheld the constitutionality of a criminal law in a Ku Klux Klan prosecution, which made it a crime to deprive a person of the right to vote for a member of Congress because of race or color or previous condition of servitude. These cases, and the laws they uphold, are clearly distinguishable from the

attempt by Congress through the Communist Control Act of 1954 to bar any candidate of the Communist Party from the ballot and thereby deprive citizens of the right to vote for candidates of their choice.

8. *The action of the appellees in refusing to accept the nominating petitions from appellants denied them of equal protection of the law.*

An unfair discrimination operating to deprive someone of the right to vote is a deprivation of equal protection of the laws as guaranteed by the Fourteenth Amendment. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1963); *Carrington* v. *Rash*, 380 U.S. 89 (1965). Appellees' attempt to bar appellants from the ballot and to deny the appellant voters of the opportunity of voting for the candidates and the party is a denial of equal protection of the laws. "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus be denied an equal opportunity to win votes." Mr. Justice Black, *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

CONCLUSION

The judgment below should be reversed and appellants granted appropriate injunctive and declaratory relief as prayed for in the amended complaint.

Respectfully submitted,

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[11] Attorney for the Appellants wishes to thank Mr. Harold Berk, Chairman of the University of Minnesota Law School Law Students Civil Rights Research Council, and the other LSCRRC law students who volunteered legal research during the course of this litigation.

APPENDIX A

Memorandum for the United States as *Amicus Curiae*

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Civil Action No. 3-68-256

CHARLENE MITCHELL and MICHAEL ZAGARELL, *et al.*,

Plaintiffs,

—VS.—

JOSEPH L. DONOVAN, Secretary of State of Minnesota, *et al.*,

Defendants.

This memorandum is filed at the express request of the Court, notwithstanding the Attorney General's earlier representation that "neither the Federal Government nor any Federal officer is a party to the litigation, nor is there any legal basis for the Government or its agents to be a party herein." In submitting this response, we stress that Section 3 of the Communist Control Act of 1954—which imposes no criminal sanction—is not administered by the Attorney General and that the Department of Justice has had no occasion to apply the provision.

I.

It may be doubted that Section 3 of the Communist Control Act (it is otherwise applicable to State election) controls this case.

On its face, the provision disables the Communist Party only, not its members. All the commentators are agreed that Section 3, of itself, does not affect the qualification of individuals who are Communists—even the most active—to run for elective office. See Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," 23 U. of Chi. L. Rev. 173, 175 (1956); Comment, "The Communist Control Act of 1954," 64 Yale L. J. 711, 738, 744-745 (1955); Note, "Federal Anti-Subversive Legislation of 1954," 55 Col. L. Rev. 631, 705-709 (1955). The threshhold question here is whether the plaintiffs, in submitting themselves as candidates, are seeking to *exercise* "rights, privileges [or] immunities" which the Communist Party would enjoy under State law as a "legal body" but for the "outlawing" of the Party by the Communist Control Act. If not, it would seem that the Act is irrelevant.

As we appraise the present situation, the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the presidential elector claimant to be credited with the votes cast for Mitchell and Zagarell depends in no degree on their status as nominees of the national or local Communist Party. It appears that, as a matter of Minnesota law, they are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and their nomination or endorsement by any established political party or other "legal body" is legally superfluous. If we are correct in this understanding, it would seem to follow that no "right,

privilege, or immunity" of the Communist Party, as such, is herein involved, and that Section 3 of the Act, therefore, has no bite.

It is not apparent why the result should be different if (as we assume) the candidates wish to appear on the ballot under the Communist Party label. In Salwen v. Rees, 16 N.J. 216, 108 A.2d 265, it is true, that circumstance is deemed sufficient to bring the Communist Control Act into play. But that is not an inevitable holding, at least in the present context.

Indeed, as we understand the applicable State law, Minnesota permits (perhaps requires) a 1-to-3 word designation of "the party or political principle" for which the candidate stands. See Minn. Stat. Section 202.10, 208.04. Rather clearly, allowing a candidate to describe himself as "Marxist" or "Stalinist" would merely conform to this disclosure provision without according the Communist Party any right as a political party or even a "legal body." So, also, the label "Communist" would seem to be a permissible description of the "political principle" represented by the candidates. Without undue quibbling, it is difficult to see that it makes a difference if "Communist" is spelled with an initial capital or if the word "Party" is added. Permitting the candidates to so describe his political beliefs does not, in itself, confer any "right, privilege, or immunity" on the Communist Party.

We recognize that the suggested construction of the Communist Control Act does not fully carry out the apparent expectations of some legislators that it would keep Communists off the ballot. See 100 Cong. Rec. 13837, 14082, 14713. But several speakers expressed doubt whether Congress could reach state elections at all (See 100 Cong. Rec.

13836, 14081, 14085, 14090-14091, 14722), and it is difficult to give controlling weight to "unrevealing random remarks" made during the legislative debate, (*Communist Party* v. *Catherwood*, 367 U.S. 389, 390). Moreover, under the broadest reading of the provision, avowed Party members would remain eligible so long as they ran as "independents." Thus, at all events, those who believe they were wholly disabling Communists as political candidates failed in achieving their purpose.

It is important to stress, however, that the construction we have outlined would *not* leave the Communist Party unhandicapped in its attempt to participate in the political process. Because the organization is deprived of any status as a political party or a legal entity it suffers special disadvantages. Most notably, unlike the representatives of bona fide political parties (See. E.G. Minn. Stat. 208.03, 208.04), its nominees do not qualify *as such*, but only if they can earn a place on the ballot independently by securing the necessary supporting signers. This is, of course, a substantial disability.

II.

The suggested construction of Section 3 of the Communist Control Act would lead to a ruling that the provision is no bar to the plaintiffs' candidacy. This would, of course, follow the example of the Supreme Court in *Communist Party* v. *Catherwood*, supra. Applying the "familiar rule that the decision of constitutional question should be avoided wherever fairly possible" (367 U.S. at 392), the Court there unanimously held the Act ineffective to disable the Communist Party from enjoying the benefits of unemployment insurance program. Here, also, we suggest, the Court would

"hesitate long" before adopting an interpretation of the provision that requires resolution of "difficult constitutional question" (367 U.S. at 394).

We merely outline some of the construction problems that, in our views, would be presented.

Perhaps the most obvious challenge to Section 3 of the Communist Control Act is that it operates as a "bill of attainder." Unlike the Subversive Activities Control Act, it abrogates rights by "legislative fiat" (*Communist Party* v. *Catherwood*, 367 U.S. at 394), without trial or hearing. And subject is directly identified by name. If the consequences for the Party and its members may properly be characterized as punishment, the provision would "seem to work an impermissible attainder" (See *U. S.* v. *Brown*, 381 U.S. 437).

There are also serious questions under the First Amendment. Insofar as Section 3 of the Act, by purporting to "outlaw" the Communist Party, inhibiting the right of all its members—those who share its illegal aim and those who do not—to join together and enjoy the benefits of organization, it may trespass on the right of group association. See e.g. *U. S.* v. *Robel*, 389 U.S. 258; *Elfbrandt* v. *Russell*, 384 U.S. 11; *NAACP* v. *Alabama*, 357 U.S. 449. Moreover, if Section 3 were construed as barring otherwise eligible candidates for elective office from labelling themselves as adherent of the Communist Party—without regard to their advocacy of the Party lawful objectives—a questionable abridgment of freedom of speech would seem to be involved. See *Whitehill* v. *Elkins*, 389 U.S. 54, construing *Gerende* v. *Election Board*, 341 U.S. 56.

Finally, a reading of the Communist Control Act that would reach this case presents troublesome questions concerning the Congressional power to establish qualifications

for Presidential elector (See U. S. Constitution, Article II, Section 1, CLS. 2. The arguably arbitrary abridgment of the right of citizens to vote and to run for elective office (See Bond v. Floyd, 385 U.S. 116; Carrington v. Rash, 380 U.S. 89).

We do not attempt to resolve the constitutional issue just outlined. There are, of course, arguments on the other side. But, these difficulties, in our views, compellingly suggest a restrictive construction of the Communist Control Act. Section 3 does not in turn control this case. We submit it need not be deemed applicable here.

Respectfully submitted,

PATRICK J. FOLEY
United States Attorney

Dated: September 23, 1968.

APPENDIX B

Candidates of the Communist Party*

1924-1949

In a report of the appellee Minnesota Secretary of State, the following participation of the Communist Party and its predecessors, and of Communist Party candidates in Minnesota, is reported:

Communist Party Vote for President in Minnesota 1924-1940

1924	William Z. Foster—Workers Party	4,427	835,002
1928	William Z. Foster—Workers Communist	4,853	999,823
1932	William Z. Foster—Communist	6,101	1,033,009
1936	Earl Browder—Communist	2,574	1,120,179
1940	Earl Browder—Communist	2,711	1,257,491

By States—Last Election in which Communist Party was on Ballot and Vote

Alabama	1940	509	Idaho	1940	276
Arizona	1932	406	Illinois	1932	15,582
Arkansas	1936	164	Indiana	1936	1,090
California	1940	13,580	Iowa	1940	1,524
Colorado	1940	378	Kansas	1928	320

* In this listing of Communist Party candidates' participation in elections, only partisan elections are reported, where candidates ran expressly as Communist Party endorsed candidates. The list does not include avowed Communists who ran in non-partisan elections, or under designations other than that of "Communist Party."

Connecticut	1940	1,091	Kentucky	1936	204
Delaware	1936	52	Louisiana	Never	
Florida	1928	3,704	Maine	1940	411
Georgia	1932	23	Maryland	1940	1,274
Massachusetts	1940	3,806	Pennsylvania	1940	4,519
Michigan	1940	2,834	Rhode Island	1940	239
Minnesota	1940	2,711	South Carolina	Never	
Mississippi	Never		South Dakota	1932	364
Missouri	1936	417	Tennessee	1936	319
Montana	1940	489	Texas	1940	212
Nebraska	Never		Utah	1940	191
Nevada	Never		Vermont	1940	411
New Hampshire	1936	193	Virginia	1940	71
New Jersey	1940	8,814	Washington	1940	2,626
New York	1936	35,609	West Virginia	1932	444
North Carolina	1936	11	Wisconsin	1940	2,394
North Dakota	1936	360	Wyoming	1936	91
Ohio	1936	5,251			
Oklahoma	Never				
Oregon	1940	191			

1940 On Ballot in 22 states

Moreover, the Communist Party and its predecessors and branches, and Communist Party candidates, have participated in the following elections across the country:

	Year	Office	Candidate
1.	1924	President Workers Party	William Z. Foster
2.	1924	Governor of Wisconsin (Independent Workers Party)	Alanne
3.	1924	Governor of New York	Cannon
4.	1928	President	William Z. Foster
5.	1928	Governor of Wisconsin (Independent Workers Party)	Hayes
6.	1928	U. S. Congress 3rd District (Minn.) (Workers Communist Party)	E. B. Ford
7.	1928	U. S. Congress 4th District (Minn.) (Workers Communist Party)	Maurice Powers
8.	1928	U. S. Congress 5th District (Minn.) (Workers Communist Party)	O. R. Votaw
9.	1928	U. S. Congress 8th District (Minn.) (Workers Communist Party)	Thomas Foley

	Year	Office	Candidate
10.	1929— Nov. 5	U. S. Congress 21st Cong. District New York	Richard B. Moore
11.	1930	Governor of Wisconsin (Independent Communist)	Blair
12.	1930	U. S. Senator Minnesota	Rudolph Harju
13.	1930	Governor of Minnesota	Karl Reeve
14.	1930	Lt. Governor, Minn.	Andrew Roine
15.	1930	Secretary or State Minnesota	Henry Bartlett
16.	1930	Member, Railroad & Warehouse Commission, Minnesota	Nick Maki
17.	1930	U. S. Congress 4th District (Minn.)	A. N. Anderson
18.	1932	President	William Z. Foster
19.	1932	Secretary of State Minnesota	Robert Turner
20.	1932	Governor of Pennsylvania	Cush
21.	1932	Governor of Minnesota	Wm. Schneiderman
22.	1932	Lt. Governor (Minn.)	John Lindman
23.	1932	Attorney General (Minn.)	Thomas Foley

	Year	Office	Candidate
24.	1934	Governor of Wisconsin (Independent Communist)	Childs
25.	1934	U. S. Senator (Minn.)	Alfred Tiala
26.	1934	Governor of Minnesota	S. K. Davis
27.	1934	Secretary of State Minnesota	Robert Turner
28.	1936	President Vice President	Earl Browder
29.	1936	Governor, Massachusetts	Otis A. Hood
30.	1936	Lt. Governor Massachusetts	Paul C. Wicks
31.	1936	Secretary of State Massachusetts	Mary E. Moore
32.	1936	Treasurer (Mass.)	Eva Hoffman
33.	1936	Auditor (Mass.)	Alfred Haase
34.	1936	Attorney General Massachusetts	Michael Tuysuzian
35.	1936	U. S. Senator Delaware	David Atis
36.	1936	Governor, Michigan	Emery
37.	1936	Governor, New York	Minor
38.	1936	U. S. Congress (1st Cong. Dist.) California	Vernon D. Healey

	Year	Office	Candidate
39.	1936	U. S. Congress (3rd Cong. Dist.) California	Perry Hill
40.	1936	U. S. Congress (4th Cong. Dist.) California	Anita Whitney
41.	1936	U. S. Congress (5th Cong. Dist.) California	Lawrence Ross
42.	1936	U. S. Congress (6th Cong. Dist.) California	Lloyd Harris
43.	1936	U. S. Congress (Cong. Dist.) California	Carl B. Patterson
44.	1936	U. S. Congress (11th Cong. Dist.) California	William Ingham
45.	1936	U. S. Congress (13th Cong. Dist.) California	Emma Cutler
46.	1936	U. S. Congress (17th Cong. Dist.) California	John L. Leach
47.	1936	U. S. Congress (19th Cong. Dist.) California	Charles McLaughlin
48.	1936	U. S. Congress 1st Cong. Dist. New Jersey	Charles S. Danenhower

	Year	Office	Candidate
49.	1936	U. S. Congress 8th Cong. Dist. New Jersey	David Reiss
50.	1936	U. S. Congress At-Large (Ohio)	William P. Sandburg
51.	1936	Governor, Rhode Island	James P. Reid
52.	1936	Auditor General Pennsylvania	B. D. Amis
53.	1936	State Treasurer Pennsylvania	Pat Toohey
54.	1937	New York City Council	Peter V. Cacchione
55.	1938	U. S. Congress 3rd Cong. Dist. California	Nora Conklin
56.	1938	U. S. Congress 6th Cong. Dist. California	Dave K. Saunders
57.	1938	U. S. Congress 11th Cong. Dist. California	Orla E. Lair
58.	1938	U. S. Congress 13th Cong. Dist. California	Louis Baron
59.	1938	U. S. Congress 15th Cong. Dist. California	Emil Freed
60.	1938	U. S. Congress 16th Cong. Dist. California	La Rue McCormick

	Year	Office	Candidate
61.	1938	Governor of Maine	Winfred V. Tabbutt
62.	1938	Governor of Maryland	Samuel Gordon
63.	1938	U. S. Senator Maryland	Harry Straw
64.	1938	Governor, Massachusetts	Otis Archer Wood
65.	1938	Governor, New Hampshire	Mrs. Elba M. Chase
66.	1938	U. S. Senator New Jersey	William Norman
67.	1938	U. S. Congress 1st Cong. Dist. New Jersey	John F. Norman
68.	1938	U. S. Congress 8th Cong. Dist. New Jersey	Manuel Cantor
69.	1938	U. S. Congress 10th Cong. Dist. New Jersey	Rose Risk
70.	1938	U. S. Congress 11th Cong. Dist. New Jersey	Lillie Brewer
71.	1938	U. S. Congress 12th Cong. Dist. New Jersey	Morris Friedal
72.	1938	U. S. Congress 13th Cong. Dist. New Jersey	Jay Anyon

	Year	Office	Candidate
73.	1938	Governor Rhode Island	A. Kominsky
74.	1938	U. S. Senator Pennsylvania	Pat Toohey
75.	1938	Governor, Pennsylvania	Ella Bloor Omholt
76.	1938	Lt. Governor Pennsylvania	Ben Careathers
77.	1938	Lt. Governor Massachusetts	Manuel Blank
78.	1938	Secretary of State Massachusetts	Hugo DeGregory
79.	1938	Treasurer Massachusetts	Frank Asher
80.	1938	Auditor, Massachusetts	Mike Tuysuzian
81.	1938	Attorney General Massachusetts	Joe Figueiredo
82.	1938	U. S. Senator Indiana	Blansett
83.	1938	Governor, Texas	Brooks
84.	1938	U. S. Senator Wisconsin	Blair
85.	1940	President Vice President	Earl Browder James W. Ford
86.	1940	Governor. California	Whitney

	Year	Office	Candidate
87.	1940	U. S. Senator Connecticut	Wofsy
88.	1940	Governor, Iowa	Speck
89.	1940	U. S. Senator Massachusetts	Frankfeld
90.	1940	Governor Massachusetts	Hood
91.	1940	Governor, Michigan	Raymond
92.	1940	U. S. Senator Michigan	Johnson
93.	1940	Governor, New Jersey	Cantor
94.	1940	U. S. Senator New Jersey	Dooner
95.	1940	U. S. Senator Pennsylvania	Reeve
96.	1940	U. S. Senator, Texas	Brooks
97.	1940	Governor, Washington	Brockway
98.	1940	Governor, Wisconsin	Blair
99.	1940	U. S. Senator Wisconsin	Furman
100.	1940	Lt. Governor Massachusetts	Hugo De Gregory
101.	1940	Treasurer Massachusetts	Henry Grossman
102.	1940	Auditor, Massachusetts	Arthur Buckley

	Year	Office	Candidate
103.	1940	U. S. Congress 1st C. D. (Calif.)	Albert J. Lima
104.	1940	U. S. Congress 3rd C. D. (Calif.)	Charles Cricus
105.	1940	U. S. Congress 4th C. D. (Calif.)	Archie Brown
106.	1940	U. S. Congress 5th C. D. (Calif.)	Walter R. Lamber
107.	1940	U. S. Congress 6th C. D. (Calif.)	Clarence Patton
108.	1940	U. S. Congress 7th C. D. (Calif.)	Alfred N. Johnson
109.	1940	U. S. Congress 8th C. D. (Calif.)	Elizabeth Nichols
110.	1940	U. S. Congress 10th C. D. (Calif.)	Louretta Adams
111.	1940	U. S. Congress 11th C. D. (Calif.)	Orla E. Lair
113.	1940	U. S. Congress 12th C. D. (Calif.)	Albert Lewis
112.	1940	U. S. Congress 14th C. D. (Calif.)	Pettis Perry
114.	1940	U. S. Congress 15th C. D. (Calif.)	Emil Freed
115.	1940	U. S. Congress 16th C. D. (Calif.)	George C. Sandy

	Year	Office	Candidate
116.	1940	U. S. Congress 18th C. D. (Calif.)	George R. Ashby
117.	1940	Governor, Connecticut	Michael A. Russo
118.	1940	U. S. Senator Maryland	Albert E. Blumberg
119.	1940	Governor, Montana	Arvo Frederickson
120.	1940	U. S. Congress 9th C. D. (New Jersey)	John F. Norman
121.	1940	Auditor General Pennsylvania	Paul
122.	1940	Governor, Texas	Ben H. Lauderdale
123.	1940	U. S. Senator Minnesota	Carl Winter (write-in)
124.	1940	Governor, Minnesota	Martin Mackie
125.	1940	Lt. Governor, Minn.	William Herron
126.	1940	Secretary of State	Clark Jorgenson
127.	1940	Governor, West Virginia	Oscar Wheeler
128.	1941	Brooklyn, N. Y. City Council	Peter V. Cacchione (Elected)
129.	1941	City Council	Israel Amter
130.	1942	Governor, Alabama	Southard
131.	1942	Governor, Colorado	Dietrich
132.	1942	U. S. Senator, Colorado	Allander
133.	1942	Governor Massachusetts	Hood

	Year	Office	Candidate
134.	1942	Governor of Wisconsin	Blair
135.	1942	U. S. Congress	Morris Graham
136.	1942	U. S. Congress 4th C. D. (Minn.)	Rose Tillotson
137.	1942	Governor Minnesota	Martin Mackie
138.	1942	Member, Railroad & Warehouse Commission Minnesota	Robert J. Kelly
139.	1943	N. Y. City Councilman	Peter V. Cacchione (Elected)
140.	1943	N. Y. City Councilman	Benjamin J. Davis, Jr. (Elected)
141.	1945	N. Y. City Councilman	Peter V. Cacchione (Elected)
142.	1945	N. Y. City Councilman	Benjamin J. Davis, Jr. (Elected)
143.	1946	U. S. Senator Michigan	Beiswenger
144.	1946	Governor, Wisconsin	Eisenscher
145.	1946	Attorney General New York State	Benjamin J. Davis, Jr.
146.	1946 Nov. 5	Comptroller New York State	Robert Thompson
147.	1946	City Council Borough of Queens N. Y.	Charles Evans

	Year	Office	Candidate
148.	1946 Nov. 5	U. S. Senator Michigan	Hugo Beiswenger
149.	1946	U. S. Congress 2nd C. D. (Mich.)	Robert Cummins
150.	1946	U. S. Congress 16th C. D. (Mich.)	William Allan
151.	1946	State Senator 3rd Dist. (Mich.)	Carneller Foreman
152.	1946	State Senator 4th Dist. (Mich.)	Walter Dunn
153.	1946	State Senator 11th Dist. (Mich.)	Stanley Adamske
154.	1946	State Representative 2nd Dist., Washtenaw County, Michigan	Thomas A. Dennis
155.	1946	State Representative 1st Dist., Genesse County, Michigan	Thomas Kelley
156.	1946	State Representative 1st Dist., Wayne County, Michigan	Fred Williams
157.	1946	State Representative 1st Dist., Wayne County, Michigan	Gerald R. Boyd
158.	1946	State Representative 1st Dist., Wayne County, Michigan	Helen Allison Winter

	Year	Office	Candidate
159.	1946	Commission Council Member, New Orleans, La.	Emanuel Levin
160.	1947 Nov. 6	N. Y. City councilman	Simon W. Gerson
161.	1948	Mayor of Mpls., Minn. Primary election	Robert J. Kelly
162.	1948	New York City Councilman	Simon W. Gerson
163.	1949	N. Y. City Councilman	Benjamin J. Davis, Jr.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF THE CASE AND JURISDICTION

Appellees accept Appellants' Statement of the Case, and the Jurisdictional Statement. Appellees, however, assert that the order of the three-judge District Court for the District of Minnesota is not appealable to this Court pursuant to 28 U.S.C. §1253.

STATUTES INVOLVED

28 U.S.C. §1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

POSITION OF THE UNITED STATES

28 U.S.C. §2403 may be applicable in that an Act of Congress, 28 U.S.C. §842, affecting the public interest is drawn in question and the United States is not a party to this appeal. A brief Amicus Curiae was filed in the Court below (see Appendix A, Brief for Appellants), but no appearance has been made in this Court by the United States.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction over an appeal pursuant to 28 U.S.C. §1253, when the order appealed from is not one granting or denying an interlocutory or permanent injunction?
2. Did the three-judge District Court properly dismiss the amended complaint for failure to present an actual controversy?
3. Does 50 U.S.C. §842 apply to elections for presidential electors, so as to bar the use of the political party designation "Communist Party, U.S.A." on the state ballot?

4. Is the Communist Control Act of 1954 a proper constitutional response to the duty of Congress to secure and protect a republican form of government when balanced against a claimed violation of the constitutional provisions which guarantee freedoms of speech, press, and assembly; and which outlaw bills of attainder?

SUMMARY OF ARGUMENT

1. *This is not an appealable order.* The November, 1968 general election rendered moot appellants' prayer for injunctive relief. The dismissal of the amended complaint denied a request for declaratory relief rather than a plea for a temporary or permanent injunction.

28 U.S.C. §1253 allows an appeal only from "an order granting or denying . . . an interlocutory or permanent injunction . . . ." The order appealed from in this case is not such an order. *Goldstein v. Cox,* 90 S. Ct. 671 (1970).

2. *The complaint fails to present an actual controversy.* Communist Party candidates were ordered placed upon the 1968 general election ballot, thus rendering moot requests for temporary and permanent injunctions. The complaint was thereafter amended to allege intended future participation in Minnesota elections and the adherence of the Attorney General to views previously expressed. Because of the contingencies involved, including (a) no strong state policy prohibiting any political organization from fielding candidates; (b) the views of the United States which raised questions concerning the constitutionality of the Act; (c) the views of the District Court to the same effect; and (d) the poor showing of the Communist candidates in 1968, there is no "actual controversy" between the parties at this time. Neither appellee will be in office after November, 1970, and it is not known whether

the same position will be taken by a future Attorney General. In short, there is a probability that the Communist Party, U.S.A., will not run candidates; but, if it does, there may be no legal obstacles to placement of the Party on the ballot.

3. *The Act is applicable and controlling.* None of the parties to this appeal disputes the applicability of the Communist Control Act to the 1968 Minnesota general election. U.S. Const. art. II, §1, cl. 2, is not an absolute prohibition against congressional protection of the elective process. The power to protect the integrity of the elective process necessarily includes the power to restrict access to the ballot to those groups which espouse a system of government which is republican in form.

4. *The Communist Control Act of 1954 is constitutional.* After extensive investigations, Congress determined that the Communist Party of the United States was an instrumentality of a foreign-based conspiracy to overthrow the Government of the United States by any means necessary, including force and violence. Acting pursuant to the powers to provide for the common defense and the duty to guarantee a republican form of government, Congress "outlawed" the Party and abolished all of its rights, privileges and immunities.

In determining whether the Communist Control Act of 1954 violates first amendment protections or constitutes a bill of attainder, the Court must necessarily balance the evils sought to be regulated against the restrictions imposed upon groups or individuals by the Act. The Act neither deprives individuals of basic freedoms, nor proscribes any group other than the Communist Party. The statute is narrowly and restrictively drawn and brings under its prohibitions only the Communist Party of the United States. The Act is a proper legislative response to the threat found to exist in the Communist Party of the United States.

ARGUMENT

I

A Direct Appeal to This Court Pursuant to 28 U.S.C. §1253 Is Impermissible, as the Order Dismissing the Complaint Could and Did Refer Only to the Prayer for a Declaratory Judgment, the Prayer for Injunctive Relief Having Been Rendered Moot by the General Election.

Appellants' original prayer for relief contained requests for temporary and permanent injunctions requiring appellee Donovan to: 1) accept and file the petition for nomination; and 2) place the names of the Communist Party candidates upon the ballot for the general election held November 5, 1968. Temporary relief was granted by an order of the three-judge District Court. *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn. 1968). Subsequent to that action, but prior to the election, appellants moved to amend their complaint by alleging a determination to participate in future Minnesota local, state and national elections, and by alleging, upon information and belief, the determination of appellee Head to render an opinion that the Communist Control Act of 1954 bars the national and state Communist Parties from participation in such elections.

Appellants chose *not* to amend their prayer for relief. Thus, subsequent to the 1968 general election, the prayer for relief sought only a declaratory judgment, the request for injunctive relief having been rendered moot by the election. Appellants' motion to amend was granted as was appellees' motion to dismiss the action as moot. *Mitchell v. Donovan*, 300 F. Supp. 1145 (D. Minn. 1969).

Appellants' appeal was taken pursuant to 28 U.S.C. §1253. However, the order is *not* appealable as it is not one which granted or denied an interlocutory or permanent injunction. The order dismissed appellants' complaint for declaratory relief.

This identical issue was raised in appellees' "Motion to Dismiss, or, in the Alternative, to Affirm the Judgment Entered Below." Probable jurisdiction, however, was noted on January 12, 1970. On January 26, 1970, this Court decided *Goldstein v. Cox*, 90 S. Ct. 671, which decision, in the opinion of appellees, compels a further discussion of section 1253 appellate jurisdiction.

In *Goldstein*, plaintiffs requested temporary and permanent injunctive relief against the operation of a New York statute which requires an alien's share of a New York estate to be paid into court when it appears that the alien would not have the benefit, use, or control of the money. After an intermediate appeal, appellants moved for summary judgment, requesting "the relief prayed for in the complaint." A three-judge District Court denied the motion, but did not dismiss the action. Appellants then appealed from the order denying summary judgment, under 28 U.S.C. §1253.

This Court determined that the appeal was improperly taken, since the power to review under section 1253 was limited to an order granting or denying a preliminary injunction.

Although plaintiffs in *Goldstein* requested injunctive relief in the original complaint, they took no practical steps to obtain such relief. No separate application for a preliminary injunction was filed, nor did they urge the appropriateness of temporary relief. The order, therefore, was not an order granting or denying a preliminary injunction, and hence was not appealable under section 1253.

In the instant case, appellants did request injunctive relief in the original complaint, but the prayer for relief was not amended subsequent to the general election. At the time of the hearing on the motion to amend, there was no request for an interlocutory or permanent injunction pending before the court. The only remaining prayer was for a declaratory judgment declaring the Communist Control Act of 1954 unconstitutional. The three-judge District Court so stated in the first sentence of its opinion:

> We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . .

300 F. Supp. at 1146.

As in *Goldstein* appellants took no steps toward obtaining temporary or permanent injunctive relief; they did not file an application for an injunction nor did they urge the appropriateness of injunctive relief, subsequent to the election. The order of dismissal, therefore, could not and did not pertain to the request for injunctive relief, but only to the request for a declaratory judgment. The order is, therefore, not appealable because it did not grant or deny an interlocutory or permanent injunction.

The interpretation of section 1253 in *Goldstein* is in accord not only with the historical development of that statute, but also with the rule that the appellate jurisdiction of this Court is to be narrowly construed under the Three-Judge Court Act. See *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317 (1926); *Phillips v. United States*, 312 U.S. 246 (1941); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

Appellants in their Jurisdictional Statement cited *Clark v.*

Poor, 274 U.S. 554 (1927), and *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), as sustaining the present jurisdiction of this Court to review the judgment on direct appeal pursuant to section 1253. In those cases, however, plaintiffs requested injunctive relief in their complaints, the complaints were dismissed and the appeals taken from the orders of dismissal. In the instant case, there was no dismissal of a request for injunctive relief, because the only injunctive relief prayed for pertained to the election of November 5, 1968.

For the above stated reasons[1] this Court lacks jurisdiction over the appeal, and therefore the same must be dismissed.

II

The Trial Court Properly Dismissed the Amended Complaint for Failure to Present an Actual Controversy.

A. *The Complaint.*

In July, 1969, the three-judge District Court granted plaintiffs' motion to amend their complaint by adding paragraphs XXV and XXVI thereto, which allege:

XXV

> The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local,

[1] See "Brief in Support of Motion to Dismiss Appeal or, in the Alternative, to Affirm the Judgment Entered Below," for additional grounds in support of appellees' contention that the Court lacks jurisdiction over the appeal.

state, and national elections subsequent to the November 5 Minnesota General Election.

Appendix 13

XXVI

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their endorsement from participating in any local, state, or national election in the State of Minnesota.

Appendix 14

In support of the motion to amend, the affidavit of Mrs. Betty M. Smith, Secretary of the Communist Party of Minnesota, was filed. Appendix 60-62. The only relevant statement contained therein is that "the *Communist Party of Minnesota* will continue to *participate* in national, state, and local elections in the State of Minnesota." (Emphasis added.) The affidavit makes no reference to the future plans or intentions of the Communist Party, U.S.A., nor does it state with particularity the manner in which the Communist Party of Minnesota will participate in future elections.

The District Court dismissed the amended complaint

(a) as "moot";

(b) as "inappropriate for adjudication"; and

(c) for the reason that the issues "do not present a 'controversy' as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U.S.C.A. §2201."

300 F. Supp. at 1147.

The rationale underlying the dismissal is perhaps best expressed by the following language of the Court:

> All the plaintiffs assert here is a 'hypothetical threat' of a possible constitutional issue as yet unframed.

300 F. Supp. at 1150.

B. *The Action Is Moot and There Is No Actual Controversy.*

Appellants do not contend that the original complaint is not moot. The relief requested, by way of a temporary injunction, has been granted. Appellants appeared on the ballot and received 415 votes out of a total of 1,606,307 ballots; the 1968 election is history; and there is no further relief available with respect to that election.

The United States Constitution, art. III, §2, and the Declaratory Judgment Act, 28 U.S.C. §2201, make it a precondition to the grant of any relief that an actual controversy exist between the parties to the litigation:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

28 U.S.C. §2201.

"Actual controversy" has been defined variously,[2] and it contemplates a real, as opposed to a hypothetical, dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant determination by the courts. See *Zwickler v. Koota*, 389 U.S. 241 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958). The constitutional standard for the basis of federal jurisdiction that there be an actual "case or controversy" is not in any way affected by having the Declaratory Judgment Act extant. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). In fact, as the court below recognized, the

> constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense more exacting, for, '[t]he Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declara-

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[2] As stated in *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243-44 (1952):

> (W)hen all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as conversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

> tion of rights; it did not impose a duty to do so.' *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111 . . . (1962).

300 F. Supp. at 1147.

The key word in the phrase is "actual." Below, the temporary injunction, issued October 2, 1968, sufficed to give appellants all of the relief they possibly could have achieved with respect to the general election. Appellees complied fully with the Court's mandate. The claimed intention of appellants to participate in Minnesota elections on unspecified future dates, and the "information and belief" as to what appellee Head will advise Minnesota election officials to do were apparently sufficient, in appellants' opinion, to create the required "actual controversy" between appellees and them. The court below quite properly found that the controversy was at best hypothetical.

A number of events have occurred since the issuance of the September 9, 1968 opinion by the Attorney General which could affect the State's position if the issue were ever presented again. *First*, this action was commenced resulting in a temporary order placing the Communist candidates on the ballot. *Second*, the position of the United States has been enunciated; and although it is erroneous with respect to the application of the Communist Control Act to these proceedings, its approach to the constitutional questions cannot be ignored. *Third*, two of the three judges below expressed "grave" doubts concerning the Act's constitutionality and the third, in effect, said the constitutional issues were not free from doubt. *Fourth*, the Communist candidates garnered only 415 votes in the election, notwithstanding the publicity attending the litigation and the "tightly scheduled campaign program"

Appendix 39, conducted by the candidates. *Fifth*, the opinion of the three-judge District Court, dismissing the complaint, strongly suggests that a different course of action by the Attorney General would be preferable if the question were again presented. Finally, both appellees Head and Donovan have declared publicly that they will not be candidates for re-election to their respective offices in November, 1970, the next statewide election.

Each of the above factors would necessarily be considered by an Attorney General in determining what course of action he should follow. There is no way today that we can predict what result would be reached.

In addition, the opinions of the Attorney General of Minnesota do not have the force and effect of law. Minn. Stat. 1967, §§ 8.02 and 8.07. Minnesota has no statute remotely comparable to the Communist Control Act, and its election laws do not in any way attempt to dictate the policies of the parties which seek to run candidates on the state ballot. The method under which a minority party is placed on the state ballot by petition is not arduous. See Minn. Stat. 1967, § 202.09 and 202.10. In short, there is nothing to indicate by statute or otherwise, a firmly imbedded state policy which would lead to the probable certainty that this "controversy" will ever be joined again.

Concurrent with the uncertainty of the position, if any, of a future Attorney General, is the equal uncertainty whether the Communist Party, U.S.A., will ever again present candidates for election in the State of Minnesota. On November 3, 1969, there were held numerous contests throughout the state to elect persons to serve as mayors, councilmen, and members of various other representative bodies. At no such election did the Communist Party, U.S.A. attempt to field a candidate.

It should also be noted that the allegations of the amended complaint do not state with certainty that Communist candidates will run for office under the party label, Communist Party, U.S.A. In fact, the use of the terminology "participate" encompasses a wide range of activities not within the prohibition of the Act.

This Court on several occasions has addressed itself to the question of what is an actual controversy. As was stated in *Mills v. Green*, 159 U.S. 651 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Id. at 653.

See, also, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947):

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field.

Id. at 89.

* * * * *

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection

> against actual interference. A hypothetical threat is not enough. . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Id. at 90.

* * * * * *

> It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . .'

Id. at 90, n. 22.

And see *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, *supra:*

> The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal inter-

ests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

312 U.S. at 273.

It is probably fair to assume that shortly prior to the presidential election of 1972 will be the first *opportunity* for the "controversy" to become "actual." The named appellees will not be in their respective offices if Communist Party candidates' petitions are then presented; and, their successors will undoubtedly recall the temporary injunction issued in October of 1968, and may consider the adamant refusal to accept a similar petition to be futile. The Party ran no candidates in Minnesota at all from 1949 to 1968: and the results in 1968 were abysmally pathetic. In this context, it would be inappropriate for this Court to issue an advisory opinion—as such is all a decision on the constitutional validity of sections 841 and 842 could be with respect to the parties herein—predicated upon issues which are now moot and which never again may arise.

C. *Recent Decisions Compel Affirmance.*

Moore v. Ogilvie, 394 U.S. 814 (1969), does not support appellants' position that this action is "capable of repetition, yet evading review." The attack in *Moore* was aimed at a 1935 Illinois statute requiring at least 25,000 electors to effectuate a valid nominating petition, which statute had been upheld in *MacDougall v. Green*, 335 U.S. 281 (1948). Thus, the Illinois system was so well entrenched by statute and judicial construction as to make it almost certain that it would not be changed. It was also clear that the area affected all future elections and represented a "continuing controversy in the

federal-state area where [the Supreme Court's] 'one man, one vote' decisions have thrust." 394 U.S. at 816.

The contrast between the Illinois statute, with its judicial construction, and the case at bar is clear. Here there was merely a written memorandum of an Attorney General, followed by expressions of the federal judiciary, and of the United States, raising questions as to the constitutionality of the Act; followed by a pathetically weak showing at the polls by the very party which now wishes all to believe that it will certainly try again.

More apposite is *Hall v. Beals*, 90 S.Ct. 200 (1969), in which this Court dismissed, as moot, a complaint challenging Colorado's six month residency requirement for voting in presidential elections. *Moore* was explained as follows:

> The problem before us was 'capable of repetition, yet evading review,' not only because the same restriction on Moore's candidacy that had adversely affected him in 1968 could do so again in 1972, but because Illinois, far from having altered its statutory scheme for the future benefit of those situated similarly to Moore, had adhered for over 30 years to the same electoral policy with no indication of change.

90 S.Ct. at 202.

Minnesota has no firm policy in this regard, much less one of 30 years' standing. It is speculative to assert that in 1972 these parties will be in conflict, and "speculative contingencies afford no basis for our passing on the substantive issues. . . ." *Hall v. Beals*, 90 S.Ct. at 202.

The instant case was appropriate for the exercise of the judicial restraint envisaged by the Declaratory Judgment Act. Just as the constitutionality of the Communist Control Act

has been called doubtful, so is the proposition that the parties to this litigation will ever again find themselves in conflict. There are simply too many contingencies involved. This is not the setting in which "grave" constitutional issues should be determined.

As stated in *Public Affairs Press v. Rickover*, 369 U.S. 111, (1962):

> Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' *Eccles v. Peoples Bank*, 333 U.S. 426, 431. We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations.

Id. at 112.

See, also, *Golden v. Zwickler*, 394 U.S. 103 (1969), dismissing a declaratory judgment action for failure to present an actual controversy:

> No federal court, whether this court or a district court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies*' . . . the express limitation of the Declaratory Judgment Act to cases 'of actual controversy' is explicit recognition of this principle.

Id. at 110.

The order appealed from should be affirmed.

III

The Communist Control Act of 1954 Is Applicable to State Elections for Presidential Electors and Is Consistent with the Provisions of U. S. Const. Art. II, § 1, Cl. 2.

A. *The Communist Control Act of 1954 Prohibits the Communist Party from Placing Candidates on the Ballot in Any Election.*

The debates in Congress demonstrate conclusively that one of the primary objects of section 842 was to prevent the very actions sought to be achieved in the instant case. See, 100 Cong. Rec. 13837, 14082, 14087, 14092, 14909 (daily ed. Aug. 17, 1954). Senator Kefauver stated that the party "could not be placed on the ballot . . ." Representative Celler stated that "The Communist Party cannot appear on the ballot, . . . cannot appear in any election." See, also, Note, "Communist Control Act of 1954," 64 *Yale L. J.* 712, 738 (1955).

In addition, in section 841, Congress found that the Communist Party was not a political party. This is further evidence of the intent of Congress to prohibit the Party from participating in the election process, the normal manner in which political parties are able to express their philosophies.

In the only case under the Act involving elections, the Supreme Court of New Jersey held the Act applicable and constitutional.[3] *Salwen v. Rees*, 16 N.J. 216, 108 A. 2d 265

[3] See also *Communist Party, U.S.A. v. Catherwood*, 168 N.E. 2d 242 (1960), where the Court of Appeals rejected arguments by petitioner that the Act was unconstitutional. Although the judgment of the Court of Appeals was reversed on other grounds, 367 U.S. 389 (1961), its conclusion on the constitutional issues was not disturbed.

(1954); see also *Op. Atty. Gen., Conn.*, 1964, Brief for Appellants 20-21; "Federal Anti-Subversive Legislation of 1954," 55 *Colum. L. Rev.* 631, 706-08 (1955); "The Communist Control Act of 1954," 53 *Mich. L. Rev.* 1153, 1159 (1955); Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," 23 *U. Chi. L. Rev.* 173, 175 (1956).

On this issue, appellees are in accord with appellants and in opposition to the position of the United States. Not only the Act, but the statutory framework of the Minnesota election law, compel the conclusion that the use of the term "Communist Party, U.S.A." as a political party was prohibited in the 1968 general election.

It should also be underscored just what Congress was not outlawing through the passage of the Communist Control Act. The Act does *not* proscribe: (1) membership in the Communist Party; (2) advocacy of Communist Party tenets; (3) voting for candidates who are known or suspected to be communists; or (4) the political candidacy of Communist Party members who do not stand for election under the banner of that party. Small "c" communism as a theory of economic development and regulation is, in itself, as entitled to espousal and implementation as any other geopolitical theory. U.S. Const. amend. I.

B. *The Power with Respect to Presidential Elections.*

Appellants assert that sections 841 and 842, as applied here, violate the provisions of U.S. Const. art. II, §1, cl. 2 which provide:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,

> equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This provision does not constitute an absolute prohibition against any congressional control over the appointment of the presidential electors. It is well settled that congressional authority is not limited to merely determining the time of choosing the presidential electors. *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934); Auerbach, "The Communist Control Act of 1954," *supra*. In *Burroughs*, this Court dismissed a constitutional attack against a provision of the Federal Corrupt Practices Act which imposed filing and reporting requirements on political committees accepting contributions or making expenditures for the purpose of influencing the election of presidential electors. In upholding the constitutionality of the statute, this Court stated:

> The only point of the constitutional objection necessary to be considered is that the power of appointment of presidential electors and the manner of their appointment are expressly committed by § 1, Art. II, of the Constitution to the states, and that the congressional authority is thereby limited to determining 'the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.' *So narrow a view of the powers of Congress in respect of the matter is without warrant.*

290 U.S. at 544 (emphasis added).

This clearly indicates that congressional power extends to taking necessary action to preserve the general government when threatened by force:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. *Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.*

Id. at 545 (emphasis added).

That Congress is not completely without power to legislate concerning the processes by which the President of the United States is elected is well settled. In *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), the Court said:

> . . . United States v. Classic, 1941, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, 'establishes the authority in Congress to legislate concerning any and all elections affecting Federal officers, whether general, special or primary, as long as they are an integral part of the procedure of choice or where in fact the primary effectively controls their choice.'

Id. at 350.

The Court enjoined the Klan from acting to interfere with and coerce Negro citizens attempting to register to vote, and upheld the voting provisions of the Civil Rights Acts of 1957 and 1964, and their applicability to elections of presidential electors, against a challenge that they were in violation of U.S. Const. art. II, § 1. Relying on *Burroughs*, the Court stated:

> The states' power over the manner of appointing presidential electors is similar to the states' reserved power to establish voting qualifications. Notwithstanding this unquestioned power in the states, '*Burroughs* holds that "Congress" has the implied power to protect the integrity of the processes of popular election of presidential electors once that mode of selection has been chosen by the state.' There is an obvious parallel between corruption of the federal electoral process by the use of money and corruption of the same process by acts of violence and intimidation that prevents voters from getting on the registration rolls or, indeed, from ever reaching the registration office.

250 F. Supp. at 354.

IV

Upon a Balancing of the Duty of Congress to Secure and Protect a Republican Form of Government to the States Against the Protection of the "Rights" of an Organization Whose Purpose Is the Overthrow of Such Republican Governments by Any Means Necessary, the Communist Control Act of 1950, 50 U.S.C. §§ 841 and 842 Is Shown to Be a Constitutional Response to the More Compelling Congressional Duty.[4]

A. *Congress Had the Constitutional Power and Duty to Enact the Communist Control Act of 1954.*

Congress had a constitutional right and duty to act, not only in its own behalf, but also on behalf of the several states, to resist effectively foreign subversion, whether internal or external:

> Means for effective resistance against foreign incursion—whether in the form of organizations which function, in some technical sense, as 'agents' of a foreign power, or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power—may not be denied to the national legislature. *'To preserve its independence, and give security against foreign aggression and encroach-*

[4] It is the position of appellees that this litigation is now moot, and fails to present an actual controversy. Should this Court determine, however, that the action is not moot, it is further appellees' position that the matter should be remanded to the District Court for a decision on the merits. The District Court has not yet passed upon any of the constitutional issues presented and it should be allowed to do so before a ruling by this Court.

> *ment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.* It matters not in what form such aggression and encroachment comes. . . .'

Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 95-96 (1961) (emphasis added).

The constitutional basis of this congressional power is made clear in the Preamble to the Federal Constitution:

> We The People of the United States, in order to . . . insure domestic Tranquility, . . . provide for the common defence, . . . do ordain and establish this Constitution for the United States of America.

The substantive constitutional grants of power are found in art. I, § 8, cl. 1:

> The Congress shall have Power To . . . provide for the common Defense . . . of the United States; . . .

and in art. IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . .

With respect to congressional action providing for the common defense, it was said in *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951):

> The power of Congress to legislate concerning the national defense includes power to declare war, to raise and support armies, to provide and maintain a navy, as well as the power to make all laws necessary and proper for carrying into execution the foregoing

> powers. These powers necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, *as well as against endeavors to subvert, undermine, or overthrow the government.*

Id. at 261 (emphasis added).

Insofar as the power of Congress is based upon art. IV, § 4, see *Oil Workers International Union v. Elliott*, 73 F. Supp. 942 (N.D. Tex. 1947).

Congress has the constitutional duty to guarantee to every state a republican form of government. Basic to this concept is that Congress recognize, as it has, that the sole legitimacy of a republican form of government is the flow of authority and responsibility to the government from the consent of the governed. A republican form of government is not guaranteed when Congress fails, or refuses to (or is prevented from), enact reasonable prophylactic measures to insure that the will of a few foreign-based individuals is not imposed upon the governed with or without its consent.

In attempting to fulfill its duty under art. IV, § 4, Congress, after following accepted principles of due process, and upon substantial competent and material evidence, justifiably determined in section 841 that the

> Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore, the Communist Party should be outlawed.

A State's refusal to follow section 842 would violate both the congressional power to determine how to guarantee a re-

publican form of government in the States, and the Supremacy Clause.

It is certainly a reasonable condition and a reasonable qualification, imposable by the Congress as a pre-condition for placing a "party" on a State ballot, that it in fact be a political party. In 1968, Minnesota, acting pursuant to the Act, in no way attempted to keep any bona fide party off the ballot no matter how "unorthodox" its ideas were.

The key distinction between allowing an organization with views akin to the Communist Party on the ballot and keeping the Communist Party, as such has been found to exist, off, is that the latter seeks and follows guidance not from the American electorate but from foreign sources over which the American voters have no control. For Congress not to proscribe the facilitation of this result would be a derogation of its responsibilities to insure a republican form of government to the States.

In *Dunne v. United States*, 138 F. 2d 137 (8th Cir. 1943), an anti-subversive federal statute was attacked upon the ground of lack of legislative power. The Court stated:

> Appellants state that 'This statute must seek its validating force in the vague and undefined "right of self-preservation."' No such extremity exists. The statute is grounded upon specific Constitutional grants of power. The Preamble, setting forth the purposes of the Constitution, includes to 'insure domestic Tranquility' and to 'provide for the common defence,' as well as to 'secure the Blessings of Liberty.' Article 1, § 8, cl. 1 specifically grants to Congress the power to 'provide for the common Defence.' Clause 18 grants the power 'To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Article IV, § 4 is 'The

> United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion,' and, upon application, 'against domestic Violence.'

Id. at 140.

The general power of Congress not only to conduct inquiries in this area, but to legislate on the basis of the information thus obtained, has been recognized repeatedly by this Court. *E.g., Barenblatt v. United States*, 360 U.S. 109 (1959), where it was stated:

> That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court. . . . In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society.'

Id. at 127-28.

The findings contained in section 841 were the result of extensive congressional investigations and legislation. See, committee reports, *Communist Party v. Control Board*, 367 U.S. at 94, n. 37; see, also, Subversive Activities Control Act of 1950, 50 U.S.C. 781. Even prior to the enactment of the Communist Control Act of 1954, the courts had recognized the objects of the Communist movement and had taken judicial notice of the threats which that movement posed. See *Martinez v. Neelly*, 197 F. 2d 462 (7th Cir. 1952), *aff'd*, 344 U.S. 916 (1953); *Carlson v. Landon*, 187 F. 2d 991 (9th Cir. 1951), *aff'd*, 342 U.S. 524 (1952); *Nat'l Maritime Union of America v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948); *In re McKay*, 71 F. Supp. 397 (N.D. Ind. 1947).

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated power. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Although courts may make inquiry to determine whether there is a reasonable basis for the legislative action, the inquiry is limited to the question of reasonableness. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

Here, Congress recorded in section 841 the basis for its action, the threat to the United States presented by the Communist Party. See *Barenblatt v. United States*, 360 U.S. at 127-29, and *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382 (1950), Mr. Justice Jackson, concurring:

> From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.

Id. at 424.

In short, the legislative findings in section 841 are "[t]he reasons for the exercise of the power" by Congress, *Carlson v. Landon*, 342 U.S. at 535. Further, as this Court said, with respect to similar findings, in *Galvan v. Press*, 347 U.S. 522 (1954):

> On the basis of extensive investigation Congress made many findings, including that in §2(1) of the Act

> that the 'Communist' movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

Id. at 529.

In *Communist Party v. Subversive Activities Control Board*, 223 F. 2d 531 (D.C. Cir. 1954), *rev'd*, 351 U.S. 115 (1956), the Court of Appeals said:

> In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of fact in cases in which constitutional questions are posed. Since then the Supreme Court has resolved the problem in American Communications Ass'n v. Douds and Galvan v. Press, both supra. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt these findings.

223 F. 2d at 565.

In the second decision in the *Communist Party v. Subversive Activities Control Board, supra,* this Court, after restating the congressional findings, reiterated the position set forth above:

> It is not for the courts to re-examine the validity of these legislative findings and reject them . . . . They are the product of extensive investigation by Committees of Congress over more than a decade and a half. . . . . We certainly cannot dismiss them as unfounded or irrational imaginings.

367 U.S. at 94-95.

In view of the evidence adduced by congressional investigations, the taking of judicial notice of similar facts, and the express recognition of the reasonableness and rationality of the congressional findings by this Court, the findings of section 841 must be accepted at this time.

B. *The First Amendment Is Not Violated.*

It must be conceded that the Communist Control Act, in prohibiting the Communist Party, U.S.A., from appearing on the ballot, denies to individuals the right to vote for electors who insist upon the use of the Communist Party, U.S.A., label. Whether the alleged deprivation of individual freedoms is sufficiently grave so as to require a declaration of the unconstitutionality of the Act is the fundamental issue. It should be also noted, however, that there is no deprivation of certain freedoms and rights. All of the plaintiffs can vote; they can vote for any individual, including members of the Communist Party. The candidates insisted upon the use of the party designation—Communist Party of the United States, thus disabling themselves from participation in the election.

There is no better settled principle of constitutional law than that the freedoms guaranteed by the first amendment are not absolute. Even direct limitations on the freedoms, otherwise protected by that amendment, are permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Dennis v. United States*, 341 U.S. 494, 509-10 (1951).[5]

Also, in *Communist Party v. Control Board, supra*, this Court stated:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation cause to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

367 U.S. at 91.

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[5] There are numerous examples of laws which place indirect restraints on freedom of speech, but which are nevertheless valid because the statute's objective lies within the power of Congress to bring about, and the restraint is a necessary and appropriate concomitant of the exercise of that power: (1) the Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns. *United Public Workers v. Mitchell, supra;* (2) the Federal Regulation of Lobbying Act (2 U.S.C. §§ 264, 266-67), validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to disclose "who is being hired, who is putting up the money, and how much." *United States v. Harriss*, 347 U.S. 612, 625, (1954); (3) the Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep accounts of contributions and to report publicly contributors as well as persons to whom such expenditures are made (2 U.S.C. §§ 241-44); *Burroughs v. United States, supra;* (4) the Foreign Agents Registration Act validly requires agents of foreign principals to register with the Attorney General and to submit detailed information relating to the agency relationship (22 U.S.C. 611 ff.); *United States v. Peace Information Center*, 97 F. Supp. at 261-63.

In prior cases, the fact that incidental and indirect restraints upon "first amendment freedoms" resulted from the steps taken by Congress to combat those evils was held not to invalidate the legislative remedy adopted.[6] However, the evils at which those statutes were directed, grave as they were, were relatively trivial compared to the evil at which this Act attempts to strike.

The evil here is the threatened destruction, through force, violence and deceit, of our national independence and of our liberties, and the passing of the nation under the domination of a foreign dictatorship. The Communist Party, Congress declared in summing up the purposes of the Act, presents "a clear present and continuing danger to the security of the United States."

It is obviously a matter of the gravest concern that there exists in this country such a highly organized conspiratorial group controlled and dominated by a foreign country. Congress has always regarded the threat to the United States represented by the Communist movement as a legitimate subject of inquiry and legislation. See, *Internal Security Manual*, S. Doc. No. 47, 83d Cong., 1st Sess., 216-18, where the many hearings held by committees of Congress investigating subversive activities from 1930 to 1953 are synopsized.

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[6] The evil aimed at by the Hatch Act was the bad effect on government service of "political activity by government emp oyees." *United Public Workers v. Mitchell*, 330 U.S. at 95. The Regulation of Lobbying Act was aimed at the danger that "the voice of the people" might go unheard by Congress due to being "drowned out by the voice of special interest groups seek ng favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. at 625. The harm sought to be eliminated by the Corrupt Practices Act was "the corrupt use of money to affect elections." *Burroughs v. United States*, 290 U.S. at 548.

The question is not whether some indirect, incidental restraint on individual freedom might result from the enforcement of a law. That there would be some such restraint is apparent. The question is whether the objective of Congress was one within its power to seek to effect, and, if so, whether the incidental restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law, as well as the nature, impact, and scope of the restraint. In an analogous context, the problem was bounded by this Court in *American Communications Ass'n v. Douds, supra,* as follows:

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evil of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'

339 U.S. at 400.

This Court repeatedly has refused to treat the Communist Party as an ordinary political party in considering the constitutionality of statutes or congressional investigations under the first amendment.

Mr. Justice Jackson in his concurring opinion in *Douds* carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may consti-

tutionally be treated as something different in law." *Id.* at 423. He found that Congress, on the basis of material before it, could rationally have concluded that:

(a) *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.*

Id. at 425;

(b) *The Communist Party alone among American parties past or present is dominated and controlled by a foreign government.*

Id. at 427;

(c) *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.*

Id. at 429; and

(d) *Every member of the Communist Party is an agent to execute the Communist program.*

Id. at 431.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494:

> One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. . . . Here we are faced with something

> very different. The American Communist Party . . . is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. . . . The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. . . . The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait.

183 F. 2d at 212-15.

See, also, *Barenblatt v. United States, supra,* in which this Court upheld the authority of a congressional committee to inquire whether a witness belonged to the Communist Party:

> On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.

360 U.S. at 127-29.

In *United States v. Robel,* 389 U.S. 258 (1967), it was held that section 5(a)(1)(D) of the Subversive Activities Control Act was unconstitutional as being an abridgement of the right of association as protected by the first amendment. That section of the Act made it a crime for a member of a Communist organization to continue employment in any plant designated as a defense facility by the Secretary of Defense. In striking down this section, this Court said:

> When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated.

Id. at 264.

* * * * *

> It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'

Id. at 265.

* * * * *

> It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment."

Id. at 262.

Aptheker v. Secretary of State, 378 U.S. 500 (1964), held that section 6 of the Subversive Activities Control Act was unconstitutional as an abridgement of the right to travel. Section 6 prohibited a member of a Communist organization (as defined in the Act), from applying for a passport. This Court stated:

> The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting.

Id. at 515.

The second portion of the test of constitutional validity in the first amendment area, is that the regulatory scheme must be drawn as precisely and narrowly as possible in order to achieve an end so as to avoid indiscriminate infringement upon protected liberties.

The restrictions complained of in *Robel* and *Aptheker* were directed at members of Communist-action organizations *without regard to the quality and degree of membership.* The Communist Control Act, on the contrary, manifests the preciseness required to avoid first amendment infirmities. It does not, through broad language, impose sanctions upon individuals nor attempt to proscribe any group other than the group named therein. The danger found by Congress is the subversive activities of the Communist Party; the remedy is to prevent the Party from enjoying the benefits of the very rights, privileges and immunities the Party seeks to destroy.

First amendment rights are not absolute. The reasonableness of infringement on first amendment rights must be determined by balancing the value to the public of the end sought against the means chosen by Congress to accomplish its goals. The value to the public of the end sought by Congress under the Act, preservation of the nation, comes highest on the scale of public values. The means chosen are rationally related to that end.[7]

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[7] It is stated in appellants' brief that the Act violates the due process clause of the fifth amendment which requires that legislation be "reasonably restricted to the evil with which it is said to deal." It has previously been demonstrated that Congress properly recognized the "evil" and the resulting legislation was properly restricted to that evil.

Complaint is further made that the Party was accorded no hearing on the charges. Obviously extensive hearings were held by Congress and its findings were made. "It is not for the courts to re-examine the validity of these legislative findings and reject them . . . They are the product of extensive investigation by Committees of Congress over more than a decade and a half." *Com-*

C. *The Communist Control Act of 1954 Is Not a Bill of Attainder.*

In *United States v. Lovett*, 328 U.S. 303 (1946), where the Court invalidated, as a bill of attainder, section 304 of the Urgent Deficiency Appropriation Act of 1943, this Court said:

> Legislative acts no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

Id. at 315-16.

More recently, in *Communist Party v. Control Board*, *supra*, the Court once more defined a bill of attainder:

> The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. See *Cummings v. Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333.

367 U.S. at 86.

United States v. Brown, 381 U.S. 437 (1965), iterated the long-standing definition of punishment by quoting from *Cummings v. Missouri*, 4 Wall (71 U.S.) 277:

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munist Party v. Control Board, 367 U.S. at 94. Additionally, no allegation is made in the complaint in this case, or elsewhere, that the findings are not true and accurate.

The discussion with respect to the first amendment is equally applicable here. Congress recognized the evil and took appropriate and effective measures to eradicate it—the elimination of the Communist Party, U.S.A., from the electoral process.

> 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact.'

381 U.S. at 448.

The Communist Control Act of 1954 terminated the rights, privileges and immunities of the Communist Party of the United States or any successor organization. Only the Party, as an organization, is proscribed by section 842; individual members of the Communist Party are not reached by section 842. By legislating to keep the Communist Party of the United States from appearing on a ballot, Congress has not precluded individual members of the Party from voting in any election or from running for any office. In short, the Act does not impose legislative punishment upon individuals when it deprives the Communist Party of the United States of its rights, privileges and immunities as a legal entity, *Albertson v. Communist Party of U.S.A.*, 8 N.Y. 2d 77, 168 N.E. 2d 242 (1960).

The facts in the instant case differ from those considered in *United States v. Brown, supra.* In *Brown*, the Court was examining the constitutionality of section 504 of the Labor-Management Reporting and Disclosure Act of 1959 which made it a crime *for a member of the Communist Party* to serve as an officer of a labor union. The Court found that although the statute referred to membership in the Communist Party, section 504 was a bill of attainder, stating:

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union

> office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

Id. at 450.

In *Brown, supra,* it was explained that the intent of the bill of attainder clause was to implement the separation of powers among the three branches of government by guarding against the legislative exercise of judicial power. It was further determined that the clause is to be liberally construed in the light of its purpose to prevent legislative punishment of designated persons or groups.

Consequently a statute which inflicts a deprivation upon named or described persons or groups which have no means available to escape the deprivation constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, discouraging future conduct. In *American Comm. Ass'n v. Douds, supra,* where the Court upheld section 9(h) of the National Labor Relations Act, the predecessor of section 504, of the Labor Management Reporting and Disclosure Act, construed in *Brown,* the Court stated it had erroneously assumed that only a law visiting retribution for past acts should constitute a bill of attainder:

> The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.

381 U.S. at 449, n. 23.

* * * * *

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts . . . . Instead, it designates . . . the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

Id. at 450.

The element missing then, from appellees' "classic bill of attainder" is the requirement that for a statute to operate as an attainder there must be no avenue open to individuals or organizations upon which the deprivations may be avoided. Here, sections 841 and 842 state that the *Communist Party* may not be on the ballot as presently constituted but it says nothing about, nor does it bar, any candidate who espouses communist principles. The Party need but change its tenets to become eligible for the ballot, and communist candidates are not interdicted at all.

D. *Two Compelling Duties of Congress—to Provide for the Common Defense and to Guarantee a Republican Form of Government to the States—Override Any Technical Impingements Upon Constitutional Freedoms Not Otherwise Absolute.*

Above, appellees have set forth, discussed, and met the objections raised by appellants as to the alleged constitutional infirmities present in the Control Act. However, cases which were decided upon a finding that an individual's rights were

or were not violated by the application of statutes, similar to the Act in intent, within the contexts and meanings of the first, fifth and fourteenth amendments are, at best, merely of tangential precedent for purposes of the present appeal. No court in the United States, with the exception of the Supreme Court of New Jersey, *Salwen v. Reees, supra,* has considered or decided the proposition as such directly is raised by this appeal: Must the sweeping protections, properly and necessarily afforded to individuals and "normal" organizations by virtue of the Constitution, be extended, in all respects and particulars, to an organization found by Congress to be, and which in fact is, an "agency of a hostile foreign power"?

On balance, the answer must be "No".

> The existence as of today of a worldwide conspiracy against free democratic government by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible.

Carlson v. Landon, 187 F. 2d 991, 997 (9th Cir. 1951), *aff'd,* 342 U.S. 524 (1952).

This "perfectly clear and uncontrovertible" finding becomes the predicate for a policy determination by this Court. Given the constitutionally imposed duties of Congress to provide for the common defense and to guarantee a republican form of government to the states, is it proper to relax to a reasonable degree, with respect to specifically determined organizations on a case-by-case basis, the constitutional strictures otherwise applicable? Phrased differently, are the "rights" of an organization whose tenets include the overthrow of the government by any means necessary, including resort to force and violence, equal or paramount to the rights others in society

have to be assured that the policies and practices of the government are changed only in peaceful, democratic ways?

The proposition, and the response to the policy query, transcend the immediate issues raised by the specific application of the Control Act to the Communist Party, U.S.A. Fundamentally at issue are determinations as to the nature, scope, and raison d'etre of "government" as a concept, coupled with what steps "government" may take to preserve itself. The *answers* to the issues posed, and as brought to light through the vehicle of this appeal, are applicable equally when juxtaposed against the "rights" of any group, left or right, which mocks our concepts of the way society should operate and which seeks the violent overthrow and suppression of such concepts, although the particular *application of the answers* may vary.

Long it has been debated whether a society should be allowed to give or vote away its freedoms. Our constitution says, in effect, yes, provided whatever system is substituted be republican in nature.

Appellees do not dispute that Congress or the States are without power, by legislation or administrative actions pursuant to delegations of authority, to prevent candidates and political organizations, otherwise republican in nature, from appearing on the ballot, irrespective of social, economic or political tenets. U.S. Const. amend. I. However, this right of candidates and organizations, republican in nature, to normal access to the ballot must be balanced against the duty of Congress to guarantee to the states that whatever philosophy of government prevails, it must be republican in nature. Republican forms of government are, of course, those which derive power from and which are responsible to the electorate. It is this *form* of government which Congress must guarantee. Guaranteeing to the Communist Party, U.S.A., or to any other

organization which is not republican in form, access to the country's political machinery would hinder, seriously, the fulfilment of the obligation imposed upon Congress by U.S. Const. art. IV, §4.

The answers to these policy inquiries, which must be determined through a balancing process, should technical constitutional infirmities be found in 50 U.S.C. §§ 841 and 842 when the Act is viewed in isolation, must determine the overall constitutionality of the Act.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction, or alternatively, the Order appealed from should be affirmed upon the ground that the District Court properly found that this was no "actual controversy" between the parties.

If the Court determines the constitutional issues presented, it should declare the Communist Control Act of 1954 to be applicable to state elections and not violative of any federal constitutional provisions.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 726.—OCTOBER TERM, 1969

Charlene Mitchell et al., Appellants, *v.* Joseph L. Donovan, Etc., et al.	On Appeal from the United States District Court for the District of Minnesota.

[June 15, 1970]

PER CURIAM.

The appellants are the 1968 Communist Party candidates for President and Vice President of the United States, various Minnesota voters who alleged a desire to vote for these candidates, and the Communist Parties of the United States and of Minnesota. The appellant candidates obtained petitions containing the requisite number of names and asked the Secretary of State of Minnesota to place them on the ballot for the 1968 election. The Secretary denied the request, relying upon an opinion by the Attorney General of the State to the effect that placing Communist Party candidates on the ballot would violate the Federal Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. §§ 841–842, which declares that the Communist Party "should be outlawed," and purports to strip it of all "rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . ."

The appellants brought an action in the United States District Court for the District of Minnesota seeking a declaration that the Communist Control Act was constitutionally invalid and praying for a temporary re-

straining order and permanent injunction requiring the Secretary to include the names of the appellant candidates on the November 1968 ballot. Because of the appellants' request for injunctive relief based upon a claim that a federal statute was unconstitutional, a three-judge District Court was empaneled pursuant to 28 U. S. C. § 2282. The three-judge court noted that time was short before the election; that the equities favored the appellants; that the United States had taken the position in an *amicus* brief that the Communist Control Act did not bar the placement of Communist Party candidates upon the ballot; and that if the Act did apply in the manner asserted by the State, there would be "grave doubts" as to its constitutionality. Accordingly, without deciding the merits of the appellants' claims, the court ordered that the names of the appellant candidates be placed on the November 1968 ballot. 290 F. Supp. 642. The candidates received the votes of 415 Minnesotans in that election.

After the election, the appellants moved to amend the complaint, alleging that the Communist Party intended to run candidates in future elections in Minnesota and, on information and belief, that Minnesota would adhere to its position that the Communist Control Act barred placing these candidates on the ballot. The District Court allowed the amendment of the complaint. It held that the prayer for injunctive relief, which referred only to the 1968 election and requested no injunction as to future conduct, had been rendered moot by the passing of that election. As to the prayer for a declaratory judgment striking down the Communist Control Act, the court found no present case or controversy. In the court's view there was insufficient certainty that the Communist Party would run candidates in the future or that Minnesota would adhere to its construction of the federal statute, to take the case out of the realm of

the hypothetical. It therefore dismissed the complaint. 300 F. Supp. 1145.

The appellants brought a direct appeal to this Court under 28 U. S. C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The appellees moved to dismiss the appeal on the ground that the order complained of was not one "granting or denying . . . an interlocutory or permanent injunction." We noted probable jurisdiction, 396 U. S. 1000. The appellees have persisted in their claim that the Court lacks jurisdiction to consider this appeal, and after hearing oral argument we have concluded that they are right.

The order appealed from does no more than deny the appellants a declaratory judgment striking down the Communist Control Act. The only injunction ever requested by the appellants was one ordering the names of the Communist Party candidates to be placed on the ballot for the November 1968 election. That injunction was granted, and no appeal was taken by the state officials. As is plain from the opening words of its opinion in the present proceeding, the District Court recognized that no request for injunctive relief was before it: "We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . ." 300 F. Supp., at 1146.

That leaves us with the question whether an order granting or denying only a declaratory judgment may be appealed to this Court under § 1253. In a recent case, *Rockefeller* v. *Catholic Medical Center*, — U. S. —, we

gave a negative answer to that question, and we adhere to that decision. Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 154–155; cf. *Zwickler* v. *Koota*, 389 U. S. 241, 254. The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgments Act of 1934, but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.[1]

We have stressed that the three-judge court legislation is not "a measure of broad social policy to be construed with great liberality," but is rather "an enactment technical in the strict sense of the word and to be applied as such." *Phillips* v. *United States*, 312 U. S. 246, 251. Thus this Court's jurisdiction under that legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term "injunction" as meaning "declaratory judgment."

We conclude, therefore, that this Court lacks jurisdiction of the appeal. A simple dismissal for want of jurisdiction, however, would leave the appellants with no

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[1] 48 Stat. 955, 28 U. S. C. §§ 2281–2282.

The early history of the three-judge court statute, then § 266 of the Judicial Code, is summarized in *Goldstein* v. *Cox*, 396 U. S. 471, 476–477. The 1937 and 1948 amendments, both of which made substantial changes in the statute, appear at 50 Stat. 752 and 62 Stat. 968, respectively.

One commentator has argued for the broader construction on grounds of policy and logical symmetry, see Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13–20, but those arguments should be directed to Congress rather than the courts.

recourse to appellate review, because they brought their appeal here rather than to the Court of Appeals and the time for appealing to the Court of Appeals has long since passed. Accordingly, as in other cases where an appeal was improperly brought to this Court rather than the Court of Appeals,* we vacate the judgment below and remand the case so that the District Court may enter a fresh order dismissing the complaint, thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals for the Eighth Circuit.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

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* *Rockefeller* v. *Catholic Medical Center*, *supra*; *Stamler* v. *Willis*, 393 U. S. 40; *Moody* v. *Flowers*, 387 U. S. 97; *Phillips* v. *United States*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 726.—October Term, 1969

Charlene Mitchell et al., Appellants, v. Joseph L. Donovan, Etc., et al.	On Appeal from the United States District Court for the District of Minnesota.

[June 15, 1970]

Mr. Justice Douglas, dissenting.

I agree with the District Court that the case is too hypothetical to qualify as a "case" or "controversy" within the meaning of Article III and I would affirm. I do not, however, share the aversion to 28 U. S. C. § 1253 which the Court's opinion reflects. I would be hospitable to its aim and purpose as my dissent in *Swift & Co.* v. *Wickham*, 382 U. S. 111, 129, indicates. The declaratory judgment is, I think, "an order granting or denying . . . an . . . injunction" within the meaning of § 1253. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, is not to the contrary. It merely held that in some circumstances "an action solely for declaratory relief" could be tried before a single judge where the "relief sought and the order entered affected an Act of Congress in a totally non-coercive fashion." *Id.*, at 154, 155. We indicated, however, that a different result would follow "whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained." *Id.*, at 155.

The *Kennedy* case, in other words, involved solely the question whether a three-judge court need always be summoned where no injunctive relief was asked or contemplated. The answer involved an analysis of 28

U. S. C. § 2281 and § 2282. We are now concerned with § 1253 and the meaning of "an order granting or denying . . . an . . . injunction." The declaratory judgment may well contain a "thou shalt not" as commanding as any injunction. Or its refusal may be as definitive an adjudication as the refusal of an injunction. Although I dissent from the result reached by the Court in *Samuels* v. *Mackell, ante* —, I agree with its statement that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid."

Where, as here, the three-judge court was properly convened, I would think that any action it took, which was denying or granting an injunction or its equivalent, would be properly here under 28 U. S. C. § 1253.